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REPORTS OF CASES  
DETERMINED IN THE  
APPELLATE COURTS  
OF ILLINOIS

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WITH A DIRECTORY OF THE JUDICIARY DEPARTMENT OF  
THE STATE. CORRECTED TO THE SEVENTEENTH OF  
JANUARY, 1900, AND A TABLE OF CASES  
REVIEWED BY THE SUPREME COURT  
TO THE SEVENTEENTH OF  
JANUARY, 1900

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VOL. LXXXV  
A. D. 1900

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REPORTED BY  
MARTIN L. NEWELL  
COUNSELOR AT LAW

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# DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO JANUARY 17, 1900.

## (1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mt. Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

### REPORTER.

ISAAC N. PHILLIPS.....Bloomington.

### JUSTICES.

*First District*—CARROLL C. BOGGS.....Fairfield.  
*Second District*—JESSE J. PHILLIPS.....Hillsboro.  
*Third District*—JACOB W. WILKIN.....Danville.  
*Fourth District*—JOSEPH N. CARTER.....Quincy.  
*Fifth District*—ALFRED M. CRAIG.....Galesburg.  
*Sixth District*—JAMES H. CARTWRIGHT.....Oregon.  
*Seventh District*—BENJAMIN D. MAGRUDER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Cartwright is the present Chief Justice.

### CLERKS.

CHRISTOPHER MAMER, Northern Grand Division, 158 Throop St., Chicago.  
ALBERT D. CADWALLADER, Central Grand Division, Lincoln.  
JACOB O. CHANCE, Southern Grand Division, Mt. Vernon.

The terms of office of these clerks expire 1902, after which time, under the act of 1897, but one clerk will be elected. The present clerks continue in charge of the records of their respective grand divisions as though said grand divisions had not been consolidated. All records, files, dockets and papers of their respective offices are now kept at the State House in Springfield.

**(2) APPELLATE COURTS.**

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These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

**REPORTER.**

**MARTIN L. NEWELL**, .....Springfield.

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**FIRST DISTRICT.**

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

**CLERK**—Thomas N. Jamieson, Ashland Block, Chicago.

**NATHANIEL C. SEARS**, Presiding Justice, Ashland Block, Chicago.

**FRANCIS ADAMS**, Justice, Ashland Block, Chicago.

**THOMAS G. WINDES**, Justice, Ashland Block, Chicago.

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**BRANCH APPELLATE COURT.\***

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**FIRST DISTRICT.**

**OLIVER H. HORTON**, Presiding Justice, Ashland Block, Chicago.

**HENRY M. SHEPARD**, Justice, Ashland Block, Chicago.

**HENRY V. FREEMAN**, Justice, Ashland Block, Chicago.

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**APPELLATE COURTS—(CONTINUED.)**

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**SECOND DISTRICT.**

Composed of the Northern Grand Division of the Supreme Court, except Cook county.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

**CLERK**—Christopher C. Duffy, Ottawa.

**JOHN D. CRABTREE**, Presiding Justice, Dixon.

**DORRANCE DIBELL**, Justice, Joliet.

**HARRY HIGBEE**, Justice, Pittsfield.

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**THIRD DISTRICT.**

Composed of the Central Grand Division of the Supreme Court.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

**CLERK**—W. C. Hippard, Springfield.

**FRANCIS M. WRIGHT**, Presiding Justice, Urbana.

**OLIVER A. HARKER**, Justice, Carbondale.

**BENJAMIN R. BURROUGHS**, Justice, Edwardsville.

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\* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statute, 1897, 508, Laws of 1897. 185.

## FOURTH DISTRICT.

Composed of the Southern Grand Division of the Supreme Court.  
Court sits at Mount Vernon, Jefferson county, on the fourth Tues-  
days in February and August.

CLERK—Frank W. Havill, Mount Vernon.

NICHOLAS E. WORTHINGTON, Presiding Justice, Peoria.

JAMES A. CREIGHTON, Justice, Springfield.

HIRAM BIGELOW, Justice, Galva.

## (3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into Seven-  
teen Judicial Circuits, as follows:

*First Circuit.*—The counties of Alexander, Pulaski, Massac, Pope,  
Johnson, Union, Jackson, Williamson and Saline.

## JUDGES.

JOSEPH P. ROBERTS, Cairo.

OLIVER A. HARKER, Carbondale.

ALONZO K. VICKERS, Vienna.

*Second Circuit.*—The counties of Hardin, Gallatin, White, Hamilton,  
Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and  
Crawford.

## JUDGES.

EDMUND D. YOUNGBLOOD, Mount Vernon.

PRINCE A. PEARCE, Carmi.

ENOCH E. NEWLIN, Robinson.

*Third Circuit.*—The counties of Randolph, Monroe, St. Clair, Madison,  
Bond, Washington and Perry.

## JUDGES.

BENJAMIN R. BURROUGHS, Edwardsville.

MARTIN W. SCHAEFER, Belleville.

WILLIAM HARTZELL, Chester.

*Fourth Circuit.*—The counties of Clinton, Marion, Clay, Fayette, Ef-  
ingham, Jasper, Montgomery, Shelby and Christian.

## JUDGES.

WILLIAM M. FARMER, Vandalia.

TRUMAN E. AMES, Shelbyville.

SAMUEL L. DWIGHT, Centralia.

*Fifth Circuit.*—The counties of Vermilion, Edgar, Clark, Cumber-  
land and Coles.

## JUDGES.

HENRY VAN SELLAR, Paris.

FERDINAND BOOKWALTER, Danville.

FRANK K. DUNN, Charleston.

*Sixth Circuit.*—The counties of Champaign, Douglas, Moultrie, Ma-  
con, DeWitt and Piatt.

## JUDGES.

FRANCIS M. WRIGHT, Urbana.

EDWARD P. VAIL, Decatur.

WILLIAM G. COCHRAN, Sullivan.

*Seventh Circuit.*—The counties of Sangamon, Macoupin, Morgan, Scott, Green and Jersey.

## JUDGES.

JAMES A. CREIGHTON, Springfield.  
ROBERT B. SHIRLEY, Carlinville.  
OWEN P. THOMPSON, Jacksonville.

*Eighth Circuit.*—The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

## JUDGES.

JOHN C. BROADY, Quincy.  
HARRY HIGBEE, Pittsfield.  
THOMAS N. MEHAN, Mason City.

*Ninth Circuit.*—The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

## JUDGES.

JOHN J. GLENN, Monmouth.  
GEORGE W. THOMPSON, Galesburg.  
JOHN A. GRAY, Canton.

*Tenth Circuit.*—The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

## JUDGES.

LESLIE D. PUTERBAUGH, Peoria.  
THOMAS M. SHAW, Lacon.  
NICHOLAS E. WORTHINGTON, Peoria.

*Eleventh Circuit.*—The counties of McLean, Livingston, Logan, Ford and Woodford.

## JUDGES.

COLOSTIN D. MYERS, Bloomington.  
GEORGE W. PATTON, Pontiac.  
JOHN H. MOFFETT, Paxton.

*Twelfth Circuit.*—The counties of Will, Kankakee and Iroquois.

## JUDGES.

DORRANCE DIBELL, Joliet.  
ROBERT W. HILSCHER, Watseka.  
JOHN SMALL, Kankakee.

*Thirteenth Circuit.*—The counties of Bureau, LaSalle and Grundy.

## JUDGES.

CHARLES BLANCHARD, Ottawa.  
HARVEY M. TRIMBLE, Princeton.  
SAMUEL C. STOUGH, Morris.

*Fourteenth Circuit.*—The counties of Rock Island, Mercer, Whiteside and Henry.

## JUDGES.

HIRAM BIGELOW, Galva.  
WILLIAM H. GEST, Rock Island.  
FRANK D. RAMSAY, Morrison.

*Fifteenth Circuit.*—The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

## JUDGES.

JOHN D. CRABTREE, Dixon.  
JAMES SHAW, Mount Carroll.  
JAMES S. BAUME, Galena.

*Sixteenth Circuit.*—The counties of Kane, Du Page, De Kalb and Kendall.

JUDGES.

HENRY B. WILLIS, Elgin.  
CHARLES A. BISHOP, Sycamore.  
GEORGE W. BROWN, Wheaton.

*Seventeenth Circuit.*—The counties of Winnebago, Boone, McHenry and Lake.

JUDGES.

JOHN C. GARVER, Rockford.  
CHARLES E. FULLER, Belvidere.  
CHARLES H. DONNELLY, Woodstock.

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(4) COURTS OF COOK COUNTY.

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The State Constitution recognizes Cook county as one judicial circuit, and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi criminal cases only, and the judges of the Circuit and Superior Courts are judges, *ex-officio*, of the Criminal Court.

CIRCUIT COURT.

CLERK—John A. Cooke, County Building, Chicago.

JUDGES.

EDWARD F. DUNNE,	JOHN GIBBONS,
MURRAY F. TULEY,	RICHARD W. CLIFFORD,
RICHARD S. TUTHILL,	THOMAS G. WINDES,
FRANCIS ADAMS,	EDMUND W. BURKE,
ARBA N. WATERMAN,	CHARLES G. NEELY,
ELBRIDGE HANECY,	FRANK BAKER,
OLIVER H. HORTON,	ABNER SMITH.

SUPERIOR COURT.

CLERK—John A. Linn, County Building, Chicago.

JUDGES.

HENRY M. SHEPARD,	ARTHUR H. CHETLAIN,
THEODORE BRENTANO,	HENRY V. FREEMAN,
PHILIP STEIN,	NATHANIEL C. SEARS,
JESSE HOLDOM,	FARLIN Q. BALL,
JONAS HUTCHINSON,	JOSEPH E. GARY,
AXEL CHYTRAUS,	MARCUS KAVANAGH.*

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\*Appointed to fill vacancy December 3, 1896.

### (5) CITY COURTS.

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City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 37, R. S., and when so established have concurrent jurisdiction within the city, with the Circuit Courts, in all civil and criminal cases, except treason and murder, and in appeals from justices of the peace residing within the city. (*Hercules Iron Works v. E., J. & E. Ry. Co.*, 141 Ill. 497.)

#### THE CITY COURT OF ALTON.

ALEXANDER W. HOPE, Judge.      FRANCIS BRANDEWEIDE, Clerk.

#### THE CITY COURT OF AURORA.

RUSSELL P. GOODWIN, Judge.      WM. FLETCHER FOWLER, Clerk.

#### THE CITY COURT OF CANTON.

W. H. HEMENOVER, Judge.      A. T. ATWATER, Clerk.

#### THE CITY COURT OF EAST ST. LOUIS.

SILAS COOK, Judge.      THOMAS J. HEALY, Clerk.

#### THE CITY COURT OF ELGIN.

RUSSELL P. GOODWIN, Judge.      JOHN J. KELLY, Clerk.

#### THE CITY COURT OF LITCHFIELD.

AMOS OLLER, Judge.      HUGH HALL, Clerk.

#### THE CITY COURT OF MATTOON.

JAMES F. HUGHES, Judge.      T. M. LYTLE, Clerk.



## (6) COUNTY AND PROBATE COURTS.

In the counties of Cook, La Salle and Peoria, each having a population of over 50,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate.

JUDGES.	COUNTIES.	COUNTY SEATS.
CARL E. EPLER.....	Adams.....	Quincy.
WM. S. DEWEY.....	Alexander.....	Cairo.
JOSEPH STORY.....	Bond.....	Greenville.
WM. C. DE WOLF, JR.....	Boone.....	Belvidere.
R. E. VANDEVENTER.....	Brown.....	Mt. Sterling.
RICHARD M. SKINNER.....	Bureau.....	Princeton.
ANDREW J. EMERICK.....	Calhoun.....	Hardin.
ALVA F. WINGERT.....	Carroll.....	Mt. Carroll.
JOHN F. ROBINSON.....	Cass.....	Virginia.
CALVIN C. STALEY.....	Champaign.....	Urbana.
RUFUS M. POTTS.....	Christian.....	Taylorville.
J. C. PERDUE.....	Clark.....	Marshall.
JOHN R. BONNEY.....	Clay.....	Louisville.
JOSEPH HANKE.....	Clinton.....	Carlyle.
JOHN P. HARRAH.....	Coles.....	Charleston.
ORRIN N. CARTER.....	Cook.....	Chicago.
.....* Pro. Judge.	Cook.....	Chicago.
AUSBY L. LOWE.....	Crawford.....	Robinson.
ELIAS MCPHERSON.....	Cumberland.....	Toledo.
WILLIAM L. POND.....	DeKalb.....	Sycamore.
GEO. K. INGHAM.....	DeWitt.....	Clinton.
WM. H. BASSETT.....	Douglas.....	Tuscola.
JOHN H. BATTEN.....	DuPage.....	Wheaton.
STEPHEN I. HEADLEY.....	Edgar.....	Paris.
WM. MCGREGOR.....	Edwards.....	Albion.
DAVID L. WRIGHT.....	Effingham.....	Effingham.
GEO. T. TURNER.....	Fayette.....	Vandalia.
ALEXANDER MCELROY.....	Ford.....	Paxton.
WM. H. HART.....	Franklin.....	Benton.
MEREDITH WALKER.....	Fulton.....	Lewistown.
GEORGE HANLON.....	Gallatin.....	Shawneetown.
DAVID F. KING.....	Greene.....	Carrollton.
A. R. JORDON.....	Grundy.....	Morris.
CHAS. B. THOMAS.....	Hamilton.....	McLeansboro.
CHELLIS E. HOOKER.....	Hancock.....	Carthage.
WM. J. HALL.....	Hardin.....	Elizabethtown.
RAUSELDON COOPER.....	Henderson.....	Oquawka.
CHESTER M. TURNER.....	Henry.....	Cambridge.
FRANK HARRY.....	Iroquois.....	Watseka.
ROBERT J. MCELVAIN.....	Jackson.....	Murphysboro.
I. D. SHAMHART.....	Jasper.....	Newton.
JOSEPH D. NORRIS.....	Jefferson.....	Mt. Vernon.
ALLEN M. SLATEN.....	Jersey.....	Jerseyville.
WM. T. HODSON.....	Jo Daviess.....	Galena.
O. R. MORGAN.....	Johnson.....	Vienna.
M. O. SOUTHWORTH.....	Kane.....	Geneva.
EBEN B. GOWER.....	Kankakee.....	Kankakee.
HENRY S. HUDSON.....	Kendall.....	Yorkville.
PHILIP S. POST.....	Knox.....	Galesburg.
DEWITT L. JONES.....	Lake.....	Waukegan.

\*Office vacant. The Hon. JOHN H. BATTEN is at present acting as Probate Judge.

JUDGES.	COUNTIES.	COUNTY SEATS.
HENRY W. JOHNSON.....	LaSalle .....	Ottawa.
ALBERT T. LARDIN, Pro. J....	LaSalle .....	Ottawa.
JASPER D. MADDING.....	Lawrence .....	Lawrenceville.
RICHARD S. FARRAND.....	Lee .....	Dixon.
CHAS. M. BARICKMAN.....	Livingston .....	Pontiac.
EMIL C. MOOS.....	Logan .....	Lincoln.
WM. L. HAMMER.....	Macon .....	Decatur.
DAVID E. KEEFE.....	Macoupin .....	Carlinville.
WM. P. EARLY.....	Madison .....	Edwardsville.
CHAS. H. HOLT.....	Marion .....	Salem.
B. W. WRIGHT.....	Marshall .....	Lacon.
JAMES A. MCCOMAS.....	Mason .....	Havana.
GEORGE SAWYER.....	Massac .....	Metropolis.
J. ROSS MICKEY.....	McDonough .....	Macomb.
ORSON H. GILLMORE.....	McHenry.....	Woodstock.
ROLAND A. RUSSELL.....	McLean .....	Bloomington.
FRANK E. BLANE.....	Menard .....	Petersburg.
WILLIAM T. CHURCH.....	Mercer .....	Aledo.
PAUL C. BREY.....	Monroe .....	Waterloo.
M. J. MCMURRY.....	Montgomery .....	Hillshoro.
CHARLES A. BARNES.....	Morgan .....	Jacksonville.
JOHN D. PURVIS.....	Moultrie .....	Sullivan.
FRANK E. REED.....	Ogle .....	Oregon.
ROBERT H. LOVETT.....	Peoria .....	Peoria.
M. M. BASSETT, Pro. Judge....	Peoria.....	Peoria.
R. W. S. WHEATLEY.....	Perry .....	Pinckneyville.
F. M. SHONKWILER.....	Piatt.....	Monticello.
B. F. BRADBURN.....	Pike .....	Pittsfield.
WM. A. WHITESIDE.....	Pope .....	Golconda.
JOHN D. BRISTOW.....	Pulaski.....	Mound City.
JOHN M. McNAB.....	Putnam .....	Hennepin.
WARREN N. WILSON.....	Randolph.....	Chester.
PARKE HUTCHINSON.....	Richland .....	Olney.
LUCIAN ADAMS.....	Rock Island.....	Rock Island.
JOHN L. THOMPSON.....	Saline.....	Harrisburg.
GEORGE W. MURRAY.....	Sangamon .....	Springfield.
H. V. TEEL.....	Schuyler.....	Rushville.
JAMES CALLANS.....	Scott.....	Winchester.
THOMAS RIGHTER.....	Shelby .....	Shelbyville.
WM. W. WRIGHT.....	Stark .....	Toulon.
FRANK PERRIN.....	St. Clair.....	Belleville.
WM. N. CRONKRITE.....	Stephenson.....	Freeport.
GEO. C. RIDER.....	Tazewell.....	Pekin.
MONROE C. CRAWFORD.....	Union .....	Jonesboro.
M. W. THOMPSON.....	Vermilion .....	Danville.
LYMAN LEEDS.....	Wabash.....	Mt. Carmel.
T. G. PEACOCK.....	Warren .....	Monmouth.
GEO. VERNOR.....	Washington.....	Nashville.
L. E. SUNDERLAND.....	Wayne.....	Fairfield.
JOHN N. WILSON.....	White .....	Carmi.
HENRY C. WARD.....	Whiteside .....	Morrison.
ALBERT O. MARSHALL.....	Will .....	Joliet.
WILEY F. SLATER.....	Williamson .....	Marion.
RUFUS C. BAILEY.....	Winnebago.....	Rockford.
THOMAS KENNEDY.....	Woodford.....	Eureka.

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IN THE

APPELLATE COURTS OF ILLINOIS.

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SECOND DISTRICT—MAY TERM, 1899.

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**Joseph J. Sanden v. Patrick R. Bannon.**

1. MASTER AND SERVANT — *Responsibility for Latent Defects in Machinery.*—The master is not responsible for injuries to his servant resulting from latent defects in appliances used in his business of which he has no knowledge or means of knowledge.

**Action on the Case**, for personal injuries. Trial in the Circuit Court of Will County; the Hon. ROBERT W. HILSCHER, Judge, presiding. Verdict and judgment for defendant; appeal by plaintiff. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

E. MEERS and M. SPRAGUE, attorneys for appellant.

HALEY & O'DONNELL, attorneys for appellee.

Although there may be some evidence tending to support plaintiff's case, yet where the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is so far insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Simmons v. C. & T. R. R. Co.*, 110 Ill. 340; *C. & A. R. R. Co. v. Adler*, 129 Ill. 335; *L. S. & M. S. R. R. Co. v. O'Conner*, 115 Ill. 254; *Bartelott v. Int. Bank*, 119 Ill. 259; *Com. Ins. Co. v. Scammon*, 123 Ill. 601; *People v. The People's Ins. Ex.*, 126 Ill.

466; Purdy v. Hall, 134 Ill. 293; Pullman Palace Car Co. v. Laack, 143 Ill. 242; Siddall v. Jansen, 143 Ill. 537; City of Spring Valley v. Spring Valley Coal Co., 173 Ill. 497; Gartside Coal Co. v. Turk, 147 Ill. 120.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was an action on the case by appellant, to recover damages for injuries sustained in consequence of the fall of a scaffold upon which he was working while in the employment of appellee. The case was before us on a former appeal, when a judgment in favor of appellant was reversed for insufficiency of evidence to support it. (Bannon v. Sanden, 68 Ill. App. 164.) For a full statement of the facts we refer to our opinion then filed, and it is unnecessary to again detail them.

On the last trial there was some evidence tending to show that the knot in the stick of 4 x 4 timber, which broke and allowed the scaffold to fall, was visible on the surface, and that reasonable care would have discovered the defect; but we think the evidence, considered as a whole, shows by a clear preponderance that it was a concealed knot, and was not visible or observable to ordinary inspection. Before appellee could be held liable, it was incumbent on appellant to prove by a preponderance of the evidence, not only that the timber was in fact defective, but also that appellee was negligent in not discovering the defect, the rule being that the master is not responsible to his servant for latent defects in the machinery or appliances used in his business of which he has no knowledge or means of knowledge. (Chicago & Alton R. R. Co. v. Platt, 89 Ill. 141; C., C. & L. C. Ry. Co. v. Troesch, 68 Ill. 545.) A detailed discussion of the testimony of the several witnesses would serve no useful purpose, and we shall not undertake it. Suffice it to say, we are satisfied the evidence does not establish the charges of negligence contained in the declaration, and it does not appear, by a preponderance thereof, that the knot in question was of such a character that appellee, by the use of ordinary care or diligence, could or ought to have

discovered it. This being so, under the rule above stated, the master was not liable. The only charge of negligence contained in the declaration was the furnishing a scaffold for appellant to work upon, which was constructed of unsafe and unsuitable material, and the only proof as to the unsafety or unsuitableness of the material was as to the existence of this knot in the one stick of timber complained of. If we are correct in the conclusion we have arrived at, that this knot was concealed, and not visible to ordinary inspection, and was of such a latent character that appellee was not, in the exercise of ordinary care, chargeable with a knowledge of its existence, then the plaintiff could not recover, and had a verdict been rendered in his favor it would have been the duty of the court to set it aside. At the close of plaintiff's evidence a motion was entered by appellee to direct a verdict in his favor, but this motion was refused. After all the evidence was in, the motion was renewed, sustained by the court, and the jury were instructed to return a verdict for appellee, and thereupon the jury returned a verdict of not guilty. A motion for new trial was overruled and judgment entered on the verdict. Appellant saved the proper exceptions and brings the case to this court for review.

It must be admitted that there was evidence for the plaintiff, which, standing alone, and without reference to the countervailing testimony, might have supported a verdict in his favor, and therefore it may be the court erred in directing a verdict for the defendant. But, when all the evidence is considered together, we are of opinion it so clearly preponderates in favor of appellee, that if a verdict had been returned in favor of appellant and judgment rendered thereon, and the cause then brought to this court, we should have felt bound to reverse the judgment without remanding the cause, and therefore the plaintiff was not harmed by the action of the court in directing a verdict. We deem it unnecessary to discuss any other questions in the case, and for the reason that the evidence was insufficient to support a verdict in favor of appellant, had he obtained one, the judgment will be affirmed.

**John Donahue v. Robert S. Egan.**

1. **CHANGE OF VENUE**—*Consent of Co-Defendants, When Unnecessary.*—Where judgment is confessed upon a judgment note and subsequently leave is given to plead, etc., it is error to refuse an application for a change of venue made in accordance with the statute, by one of the joint makers after having filed a plea that as to him the note is a forgery.

2. **INSTRUCTIONS**—*Singling Out and Giving Undue Prominence to Particular Witnesses.*—An instruction which singles out and gives undue prominence to the testimony of a particular witness is properly refused.

**Assumpsit**, on a judgment note. Trial in the City Court of Elgin; the Hon. RUSSELL P. GOODWIN, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed October 12, 1899.

D. B. SHERWOOD, attorney for appellant.

Appellant having shown a clear right to a change of venue, it was error to refuse it, and all subsequent proceedings of the court were and are erroneous. *Barrows v. The People*, 11 Ill. 121.

Where party seeking a change of venue complies with the statute in relation thereto, the court has no discretion in the matter but must award the change. *Knickerbocker Ins. Co. v. Tolman et al.*, 80 Ill. 106.

The statutory requisition that all parties shall join in an application for a change of venue extends only to such of them as have a trial pending; defendants in default need not join in the application, as no action is pending as to them. *Hitt v. Allen*, 13 Ill. 592; *Walcott v. Walcott*, 32 Wis. 63; *Eldred v. Becker*, 60 Wis. 48.

Defendants in default have no interest in the motion. *Hitt v. Allen*, 13 Ill. 592; *Chace v. Benham*, 12 Wend. 200.

J. A. RUSSELL and ERNEST C. LUTHER, attorneys for appellee.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was a suit upon a judgment note, dated November

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6, 1897, purporting to be signed by James Clinnin, Jr., and appellant.

On September 26, 1898, the clerk of the City Court of Elgin, in vacation, entered judgment by confession on this note against both the makers thereof, for \$227.40. On October 25, 1898, appellant entered his motion in said court to set aside the judgment and to quash the execution issued thereon. The motion was heard upon proofs presented, and an order was entered that appellant be allowed to plead to the declaration, and that the judgment and execution stand as a lien until the further order of the court. Appellant pleaded to the declaration, claiming that his alleged signature to the note was a forgery. Thereafter, on January 3, 1899, appellant filed a petition for a change of venue from the said City Court, and gave proper notice to the opposite party. A hearing was had upon the petition, the co-defendant, Clinnin, filing a paper objecting to the venue being changed, and the petition was thereupon denied. This application for a change of venue appears to have been in due form and in accordance with the statute upon that subject. We see no reason why the petition was not granted, unless it was properly denied for the reason that Clinnin did not join therein but objected to the change; or because a change of venue can not be granted when, after judgment confessed, the defendant is allowed to plead while the judgment stands as a security.

As to the first point—inasmuch as there was a judgment against Clinnin to which he made no defense or objection, he was not a party to the trial between the plaintiff and defendant Donahue. As to Clinnin there was nothing to try. His consent or objection was in no way material. (*Hitt v. Allen*, 13 Ill. 592.)

No reason appears and none is suggested to us, why Donahue was not entitled to a change of venue. As the record then stood there was just as complete a case and issue to try between plaintiff and Donahue, as if no judgment had ever been entered therein against the latter. We are of opinion the change of venue statute must be held to apply

to such a case. Should another judge be called in to try the case, it would not leave the court in which the action was pending. On the other hand, if the case were sent to a court of record, in that, or some other county, for trial, no inconvenience would necessarily occur. If the plaintiff succeeded in the cause, such other court could readily make an order that the order of the City Court of Elgin of October 25, 1898 (which, while not specifically staying the execution was treated by all parties as having that effect), be vacated.

If the issues were found for the defendant Donahue, then would follow an order that the judgment be vacated as to him, and that the execution issued thereon against him be perpetually stayed.

We hold it was reversible error to refuse the change of venue.

The cause was tried by a jury on the issues formed upon appellant's pleas, and a verdict returned finding that appellant signed the note, his denial of signing the note being his only defense. An order was thereupon entered confirming the judgment and vacating the order by which the execution was stayed.

Inasmuch as the case must be tried again, we refrain from entering upon any discussion of the evidence.

Complaint is made of the first instruction given for the plaintiff. No assignment of error questions the propriety of the court's action upon the instructions nor the ruling of the court upon the motion for a new trial, and hence we would not reverse the judgment for error in the instruction complained of. But for guidance on another trial, it is proper for us to say the first instruction should not have been given. It is obviously erroneous, as singling out and giving undue prominence to the testimony of witnesses who, it is claimed, saw appellant write the signature in controversy, and making the whole question turn upon their testimony. It is the duty of the jury to consider all the evidence in the case, as well that of defendant as of plaintiff, and render a verdict accordingly as it may preponderate



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in favor of one party or the other. This error can readily be corrected on another trial.

Because the court erroneously refused the application for a change of venue, the judgment will be reversed and the cause remanded for further proceedings not inconsistent with this opinion. Reversed and remanded.

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### George W. Shaw v. Samuel H. Allen.

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1. **CLOUD UPON TITLE—Legal Owner in Possession.**—It is not necessary for the legal owner of real estate, in possession of the same, to continually watch the records to ascertain whether some person has filed some paper title to, or lien upon, his land since he acquired his title and went into possession, in order that he may bring suit to remove it as a cloud upon his title.

2. **SAME—Rights of Owner in Possession—Laches.**—An owner of land in possession may rest in security until his title is attacked, and until this is done, *laches* will not run against him.

3. **SAME—Void Deeds and Decrees upon Record.**—A void deed, or decree, upon record, if good on its face, and likely to have the effect to deter others from the purchase, and impair the market value of the land, if useless in the hands of the holder, except as a means of annoyance and extortion, is a fit cause for the interposition of a court of chancery to deprive the instrument of its means of mischief by its cancellation.

4. **LACHES—When the Doctrine Can Not be Invoked.**—The doctrine of *laches* can not be invoked against a person in possession of land without knowledge of the existence of a cloud upon his title, who commences a suit to remove it after he acquires knowledge of it.

**Bill to Remove a Cloud upon Title.**—Trial in the Circuit Court of Henry County; the Hon. WILLIAM H. GEST, Judge, presiding. Hearing and decree for complainants; appeal by defendant. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

GEORGE W. SHAW, attorney *pro se*.

A party challenging a sale should be prompt in discovering that which may avoid his title, and diligent in his application for relief. Unreasonable delay, not explained by equitable circumstances, has always been declared fatal to such suits. *Bush v. Sherman*, 80 Ill. 160; *Howe v. South Park Com'rs*, 119 Ill. 101; *Bates v. Gillett*, 132 Ill. 303.

Courts of equity apply to suits for removing cloud from title, the analogy of the statute limiting writs of error. *Hodgen v. Guttery*, 58 Ill. 431; *Cleaver v. Green*, 107 Ill. 67.

While possession by a complainant usually prevents the running of statutes of limitation, the cases which may be relied on in support of the application of the principle to this case do not apply where there has been neglect to file a bill to set aside a sale. Argument reviews cases. *Laches* is principally the question of the inequity of permitting a claim to be enforced—an inequity founded in some change in the condition or relations of parties. *Gallihier v. Cadwell*, 145 U. S. 368; *Penn. Mutual Ins. Co. v. Austin*, 168 U. S. 685.

Possession of land does not excuse a party from prosecuting a suit to set aside a sale within the prescribed period of limitation. *Hanner v. Moulton*, 138 U. S. 486.

DUNHAM & FOSTER, attorneys for appellee.

*Laches* is not imputable to persons in possession, as in the case at bar a party in the actual possession of land may safely lie by until his possession is invaded or his title attacked. Till this is done, *laches* will not run against him. *Bush v. Stanley*, 122 Ill. 406; *Orthwein v. Thomas*, 127 Ill. 554; *Newell v. Montgomery*, 129 Ill. 58; *Boyd v. Boyd*, 163 Ill. 611.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a bill in chancery filed on September 21, 1898, in the Circuit Court of Henry County, by appellee against appellant, for the purpose of removing a cloud from his title to certain lands in that county.

The bill as amended charges that appellee acquired a fee simple title to the premises of one Riley J. Brown, on the 20th day of March, 1895, and that he has ever since been in the open and exclusive possession thereof; that said Riley J. Brown had been the absolute owner and possessor thereof from 1875 until she conveyed the same to appellee as aforesaid; that on the 21st day of August, 1880, the sheriff of said county executed to appellant a deed of conveyance of

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said premises, which was duly recorded, purporting to have been executed in pursuance of a sale by the sheriff, by virtue of an execution issued upon a judgment against one John M. Brown, in a suit against him by one Isaac Callendar; that when said judgment was rendered and for a considerable time prior thereto, said Riley J. Brown was the sole and absolute owner and possessor of said premises and continued such sole owner and possessor thereof until she conveyed the same to appellee as above stated; that said John M. Brown did not, at the time said judgment was rendered, have, and has not since had, any interest or title to said premises or any part thereof; that said sheriff's deed is a cloud upon appellee's title to said premises and depreciates the value thereof; that appellant has been requested to remove said cloud but refused and still does refuse so to do; that said Riley J. Brown had no knowledge whatever of the sale upon said execution or of said sheriff's deed to appellee until she conveyed the premises to appellee; that appellee, with her consent, withheld and still withholds \$500 of the purchase money to indemnify him from all loss, costs and expenses in prosecuting a bill in chancery to remove the cloud from his title. In conclusion there is a prayer that said deed to appellant be declared void, as a cloud upon appellant's title, and canceled. The appellant demurred to the bill generally and specially. The special causes of demurrer assigned were that the bill showed such *laches* on the part of appellee and his grantor as to bar him from equitable relief, and that appellee's remedy was at law. The demurrer was overruled and appellant having abided by it, a decree *pro confesso* was entered against him, setting aside his said deed as a cloud upon said title, and for costs of suit.

It is contended by appellant that appellee is barred by *laches* from maintaining his bill. As the case was heard upon the bill and demurrer thereto, all the material facts stated therein and well pleaded, are to be taken as absolutely true. From the bill it appears that Riley J. Brown was in possession of the premises in question from 1875 until 1895, when

she conveyed the same to appellee, and that she never knew of the sheriff's deed to appellant until she made such conveyance, at which time she made arrangements to procure the removal of said sheriff's deed as a cloud upon her title. It also appears that appellee has been in possession of said premises since he purchased the same in 1895.

It is not necessary for the legal owner of real estate in possession of the same to continually watch the records to ascertain whether, since he acquired his title and went into possession, any other person has filed some paper title to, or lien upon, the same, in order that he may bring suit to remove such cloud. Such owner in possession may rest in security until his title is attacked, and until this is done, *laches* will not run against him. *Boyd v. Boyd*, 163 Ill. 611; *Newell v. Montgomery*, 129 Ill. 58; *Orthwein v. Thomas*, 127 Ill. 554; *Bush v. Stanley*, 122 Ill. 406. But even if the doctrine of *laches* could be invoked against a person in possession, none could be charged to *Riley J. Brown*, because she had no knowledge of the existence of said deed to appellant until she sold the premises, when she at once made arrangements to have the cloud upon the title removed. Nor was appellee guilty of *laches*, as he commenced his suit in a reasonable time, under the circumstances, after he acquired title.

Appellant further contends that appellee is not entitled to maintain his bill for the reason that the sheriff's deed to him does not constitute even a cloud upon appellee's title to said premises, and that therefore there is no need of the intervention of a court of equity to remove it.

The authorities, however, do not sustain the position of appellant. It would be manifestly unjust and inequitable to permit him to defeat this action on the ground that his deed is not a cloud upon appellee's title, while at the same time the deed is permitted to remain of record substantially unchallenged.

The language of the Supreme Court in the case of *Reed v. Tyler*, 56 Ill. 288, is appropriate here. It is there said, in reference to a void tax deed:

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"The deed is good on its face. Its presence on the record would be likely to have the effect to deter from the purchase and impair the market value of the land; it is useless in the hands of the holder, except as a means of annoyance and extortion, and it seems a fit case for the interposition of the power of a court of chancery to deprive the instrument of its means of mischief by its cancellation."

The case of *Van Dorn v. Leeper*, 95 Ill. 35, was very similar to the case at bar. In that case appellee filed a bill to remove a cloud upon the title of her real estate, created by the sale of the premises on an execution against her husband, and the Supreme Court sustained a decree setting the sale aside and declaring it null and void.

In *Hodgen v. Guttery*, 58 Ill. 431, it was held that equity would entertain jurisdiction, at the instance of the owner in fee of lands, to remove a cloud upon his title, created by a sale of the premises, and a deed thereunder, under a decree of foreclosure of a mortgage thereon, although the decree and deed were as to him void. It is there said:

"The decree being void as to appellee in the former suit, and he not being able to pay or the land not being chargeable with the mortgage, has appellee any right to maintain this bill? We think he clearly may, to remove a cloud on his title. Here is a decree, void as to him, it is true, and a sale and deed made under the decree equally void, but still it is such as to deter some, and render others doubtful, in the purchase of his title. It is calculated to materially impair the price of the land if put upon the market, as all persons would expect that it would lead to litigation, costs and vexation. It, for that reason, is such a cloud as authorizes a court of equity to entertain jurisdiction for its removal."

The bill in this case clearly presented facts which, under the above authorities, entitled appellee to maintain his suit to remove appellant's deed, as a cloud upon his title.

The decree of the court below will therefore be affirmed.

**Charles B. Wheeler, Assignee, v. The Home Savings & State Bank.**

1. **VOLUNTARY ASSIGNMENTS—*What Title Passes.***—The assignee under the insolvent act takes the property assigned affected with every infirmity, and subject to every defense and equity, which rested upon it in the hands of the assignor.

2. **SAME—*Contract Rights and Secret Liens.***—An assignee under the insolvent act takes the property subject to all liens and contract rights, although not of record and of which he has no notice, and he has no greater right to recover property by litigation than the assignor would have had, if no assignment had been made.

3. **RATIFICATION—*By Acquiescence.***—When a director, acting as the treasurer and general manager of a corporation, pledges a portion of its assets as collateral security for his individual debt, the acquiescence of the corporation in such action for a number of years will justify the inference that the pledging was with the consent of the corporation.

**Replevin.**—Trial in the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Finding and judgment for defendant; appeal by plaintiff. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

WINSLOW EVANS, attorney for appellant, contended that P. J. Singer, in making the representations as to Singer & Wheeler owing him, and that he had made an arrangement and would pledge the warehouse receipts in question for his own debt, was acting in his own interest, and the bank had no right to rely upon them.

It was the duty of the bank to have made inquiry of other officers and agents of the corporation, Singer & Wheeler, as to the title and authority of P. J. Singer to deal with the warehouse receipts as proposed.

The bank is chargeable with notice of whatever such inquiry would have revealed.

Having taken the warehouse receipts without such inquiry, it held them subject to the right of the corporation, Singer & Wheeler. *Germania Safety Vault & Trust Co. v. Boynton*, 19 C. C. A. 118, 71 Fed. Rep. 797; *Wilson v. M. E. R. Co.*, 120 N. Y. 145; *Shaw v. Spencer et al.*, 100

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Mass. 382; Bank of N. Y. N. B. Ass'n v. A. D. & T. Co., 143 N. Y. 559; Claffin v. Farmers' & Citizens' Bank, 25 N. Y. 993; Smith v. Immigration, etc., Ass'n, 78 Cal. 289; Wilbur v. Lynde, 49 Cal. 290; Garrard v. Pitts. & C. Ry. Co., 29 Pa. St. 154; Board of Education v. Sinton, 41 Ohio St. 504; Farrington v. South Boston R. Co., 150 Mass. 406; Moores v. Citizens' Nat. Bank of Piqua, 111 U. S. 156; Nat. City Bank v. Jaudon, 15 Wall. (U. S.) 165; Pendleton v. Fay, 2 Paige (N. Y.), 202; Park Hotel Co. v. Fourth Nat. Bank, 30 C. C. A. 409, 86 Fed. Rep. 742.

The act of P. J. Singer, in pledging the property of Singer & Wheeler to the bank to secure his individual debt, was *ultra vires*, and the act of W. A. Singer, after such pledging, in indorsing the name of Singer & Wheeler on the warehouse receipts, even if done for the purpose of aiding P. J. Singer in such pledging, was likewise *ultra vires* and void, and so known to the bank. Germania S. V. & T. Co. v. Boynton, 19 C. C. A. 118; Park Hotel Co. v. Fourth Nat. Bank, 30 C. C. A. 409.

The acts or declarations or course of dealings relied upon as waiver or estoppel must have been with full knowledge of all the facts. Bliss on Fire Insurance, Section 267.

There can be no waiver or estoppel in absence of complete knowledge of all the circumstances; and the fact that the assured, during the life of the policy, notified the company that the premises were vacant and received the reply "all right," will not amount to an estoppel, unless it also appears that the company was also made aware that the house was vacant a month before the policy was issued and had continued so ever since. Good faith and fair dealing required that all the facts should have been stated. Boyd v. Insurance Co., 90 Tenn. 212.

Estoppels are not favored in the law, and an estoppel *in pais* is never allowed to be used as an instrument of fraud, but is to be resorted to solely as a means to prevent injustice; always as a shield, never as a sword. Pierpont v. Barnard, 5 Barb. (N. Y.) 364.

Where a party, with full knowledge of all the facts

creating the liability, acquiesces in what has been done, he thereby ratifies what has been done, and silence in such case, after a reasonable length of time, will amount to a ratification. 2 Hermann on Estoppel, Sections 768, 769.

It is scarcely necessary to say that a ratification, to be efficacious, must be made by a party who had power to do the act in the first place, and that it must be made with knowledge of the material facts. Western Nat. Bank v. Armstrong, 152 U. S. 346.

The doctrine of estoppel *in pais* will not be applied to a person who has been guilty of no fraud simply because, under a misapprehension of law, he has treated as legal and valid an act open to the inspection of all. Holcomb et al. v. Boynton, 151 Ill. 294-300.

DAN F. RAUM and N. ULRICH, attorneys for appellee.

Private corporations have the right to borrow money to carry on business and to give security therefor in any manner not prohibited by law, the rule being the same as with natural persons. Rockwell v. Elkhorn Bank, 13 Wis. 653; Ward v. Johnson, 95 Ill. 215.

A private trading corporation has the power to dispose of its commercial assets by way of pledge or mortgage, or other security, for any debt it may lawfully contract. Leo v. U. P. R. R. Co., 17 Fed. Rep. 273; Platt v. U. P. R. R. Co., 99 U. S. 48.

The general manager of the business and affairs of a trading corporation, in whose hands the entire management of the affairs of the corporation is permitted to be placed, may, without other authority from the board of directors, pledge its commercial assets for the debt of the corporation. 4 Thomp. on Corp., Sec. 4849.

The president of a solvent going corporation, who is also its general manager, acting in good faith, has the right to loan his money to such corporation and take in like manner as a stranger its property, choses in action, etc., in pledge as collateral security for the money loaned by him to it, and the subsequent insolvency of the corporation will not



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affect his right to enforce such security. *Mullanphy Bank v. Shott*, 135 Ill. 655; *Ill. Steel Co. v. O'Donnell*, 156 Ill. 633; *Beach v. Miller*, 130 Ill. 162.

Corporations like *Singer & Wheeler* are private commercial enterprises, notwithstanding their form of organization; their form of corporate organization is permitted to them mainly to enable the stockholders to avoid individual liability for debts to which they would be exposed if not so organized, and the strict limitations that govern public corporations and their officers are not to be applied with the same strictness to private business corporations. *Bradley v. Ballard*, 55 Ill. 413.

All business of a corporation is done through its agents, and private trading corporations have the right to employ or appoint agents and servants for the transaction of their commercial business to the same extent as natural persons. 4 *Thomp. on Corp.*, Sec. 4874.

Strangers dealing with a corporation are not required to know the provisions of its by-laws, but its officers and agents must be taken to have the authority which designations imply, and also those which they are permitted by the corporation to exercise. *Home Life Ins. Co. v. Pierce*, 75 Ill. 426.

When an agent acts within the scope of his apparent authority, though in excess of authority actually given, the other party having no notice of the limitation, the principal is bound. *St. L. & Memphis Packet Co. v. Parker*, 59 Ill. 23; *U. S. Life Ins. Co. v. Advance Co.*, 80 Ill. 549.

Innocent strangers are not concerned with the rightful exercise by corporate agents of their powers, and corporations are responsible for the frauds of their officers and agents within the scope of their powers. 4 *Thomp. on Corp.*, Secs. 4931-4932.

Although the act of an agent operates as a fraud upon the principal, yet if done within the scope of the agent's apparent authority, the principal will be bound as to third persons for the act. *Harvey v. Miles*, 16 Ill. App. 532.

As a general rule, a party will be concluded from denying

his own acts or admissions which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter. *Kinnear v. Mackey*, 85 Ill. 96.

Acquiescence for a considerable time by a corporation, through its efficient agencies, and the body of its stockholders, in a state of facts after knowledge, or after such a length of time and such a condition of circumstance that knowledge is to be inferred, will operate as a ratification. 4 *Thomp. on Corp.*, Sec. 5298, and cases cited.

MR. JUSTICE DIBELL delivered the opinion of the court.

This case, with the title reversed, was before us in 74 Ill. App. 261. Our statement of the case and our opinion then rendered very fully outlined the evidence and the law we held applicable to the facts. We here refer to that statement and opinion; and much that is there said we need not here repeat. After the cause returned to the Circuit Court, another trial was had without a jury, and the bill of exceptions of the evidence heard at the first trial was used as the evidence at such second trial; but with a stipulation between the parties, used in the place of further testimony; and the contents of that stipulation present the only difference in matters of fact between the former record in this court and the one now before us. In that stipulation it was agreed that on September 14, 1893, when P. J. Singer gave the bank his note for \$10,000, and left said warehouse certificates as collateral therefor, Singer & Wheeler did not owe him anything, but he was then largely indebted to Singer & Wheeler upon certain notes described in the stipulation, and that he continued so indebted to Singer & Wheeler up to the time of the assignment of Singer & Wheeler on January 10, 1896, but that the bank had no knowledge or notice of said indebtedness from P. J. Singer to Singer & Wheeler on said September 14, 1893, nor till after the assignment of Singer & Wheeler; that at the time said warehouse certificates were pledged by P. J. Singer to the bank, the board of directors of Singer & Wheeler had

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taken no action arranging for or authorizing P. J. Singer to pledge said warehouse certificates as collateral security for his debt to the bank; that P. J. Singer, if present, would testify (and he was to be considered as testifying) that he had no recollection of making to the officers of the bank the statements as to the indebtedness of Singer & Wheeler to him, and as to an arrangement with Singer & Wheeler, by which he was authorized to pledge said warehouse certificates as collateral to his debt to the bank, which said officers testified he did make to them, as set out fully in our former statement and opinion; and, further, that P. J. Singer would testify that at that time he had not in fact consulted the officers or agents of Singer & Wheeler, other than himself, about pledging said warehouse certificates for his own debt, and had made no arrangement therefor. The court below rendered judgment for the bank, and the assignee prosecutes this appeal.

The evidence embraced in the stipulation destroys some of the inferences which in our former opinion we drew from the silence of the former record. The question now is whether, under the evidence now before us, Singer & Wheeler and its assignee are estopped from claiming the warehouse certificates from the bank. P. J. Singer still owes the bank upon said debt a sum larger than the value of the whisky not applied in payment of taxes thereon. We adhere to our former conclusion as to the rules of law governing the title of an assignee and his right to recover, and hold that the plaintiff only stands in the shoes of Singer & Wheeler. We before held the statements of P. J. Singer to the bank, on and shortly before the arrangement of September 14, 1893, were self-serving, and the bank could not rely upon them. The new testimony, that P. J. Singer does not remember making said statements to the officers of the bank, is by no means a denial that he made the statements. In view of the fact that he now confesses the statements were untrue, his inability to deny that he made them is rather in the nature of a confession that he did so state. His testimony, therefore, has no tendency to overcome the

testimony of the bank officers as to what he told them. It now appears said statements were in fact false, but that the bank did not know it at that time, nor at any time up to the assignment of Singer & Wheeler, January 10, 1896.

P. J. Singer gave his \$10,000 note to the bank (a renewal of two notes of \$5,000 each) on September 14, 1893, and on that day, as collateral security, he pledged to the bank the warehouse certificates now in question (or their predecessors, as some of the whisky was removed from the bonded warehouse to the free warehouse, and the old certificates surrendered and new ones issued for the same whisky), he then and previously claiming to the bank officers that Singer & Wheeler owed him more than \$10,000, and that he could pay his debt to the bank if Singer & Wheeler could withdraw that sum from its business and pay him; but that it could not then do so; and that he had made an arrangement by which he could and did pledge the said warehouse certificates to the bank as collateral for his debt. At that time the bank still held said certificates as collateral to a note of Singer & Wheeler for \$5,000, upon which \$4,000 had been paid. What are the acts, facts and circumstances which tend to estop Singer & Wheeler (and therefore to estop its assignee) from now claiming said certificates as against the bank?

First. On September 20, 1893, one week after said certificates were pledged for P. J. Singer's debt, an officer or representative of Singer & Wheeler came to the bank and paid the remaining \$1,000 due from Singer & Wheeler to the bank, and took up the \$5,000 note given by Singer & Wheeler to the bank. If Singer & Wheeler had not consented to the pledging of said certificates for the debt of P. J. Singer—if the corporation knew nothing of that pledge, or knowing had not consented—the one natural thing to have then done was to call for and take up said certificates, whose office as security for the note of Singer & Wheeler was now terminated by the final payment upon that debt. On the theory of appellant, no reason existed why the corporation should not then repossess itself of its certificates.

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The person paying the Singer & Wheeler note did not ask for them. This silence was an apparent recognition and ratification of their having been also pledged for P. J. Singer's personal debt. It tended to lull the officers of the bank into entire security that they were properly so pledged.

Second. Shortly thereafter an officer of the bank carried these certificates to W. A. Singer and told him the bank had been holding them as collateral to a note of Singer & Wheeler, but now held them as collateral security for a note of P. J. Singer, and asked him to indorse them for Singer & Wheeler. W. A. Singer was one of the three directors of Singer & Wheeler, and was its secretary. He was at the office of Singer & Wheeler where its books and records were. The evidence shows Singer & Wheeler did not then owe the bank anything. The object and effect of the indorsement requested was to put the title to said certificates out of Singer & Wheeler so that they could be effectively used by the bank as security for P. J. Singer's note. W. A. Singer was an officer intrusted by the Singer & Wheeler corporation with the conduct of its business. He thereupon indorsed these certificates in the name of Singer & Wheeler and delivered them so indorsed to the officer of the bank; and W. A. Singer testified, "I indorsed those warehouse receipts so the bank could hold them as collateral for a note of \$10,000 given by P. J. Singer a short time before." It is clear W. A. Singer knew of the note P. J. Singer had given. He did not hesitate; he made no further inquiry. He did not deny or question the propriety of the pledging. By this act at that time the secretary of Singer & Wheeler knowingly indorsed and delivered these certificates to the bank for the purpose of enabling it to hold, use and enforce them as security for P. J. Singer's note. There is no basis for attributing bad faith to the bank. The prompt action of the secretary made it unnecessary for the bank's officer to make any further inquiry or go into any further particulars. This officer of Singer & Wheeler acted as if he understood the situation perfectly,

and he at once placed the complete legal control of the certificates in the bank for that particular purpose. If private corporations are to be bound by the acts of their officers when at their office, engaged in their business, then these securities were on that day pledged for this debt. Certainly the bank was not required to go further. Of whom should the bank have made further inquiries? Not of Barker, the third director—for he did not transact any of the affairs of the corporation, and his only official act was to meet with the other directors about once a year. Not of any subordinate employe—that would have been an act of impertinence, after the secretary had so promptly indorsed said certificates and re-delivered them for the express benefit and use of the bank.

Third. In the spring of 1894, some six months after the certificates were so pledged for the debt of P. J. Singer, Singer & Wheeler wished to use five barrels of a particular brand of said whisky. Singer & Wheeler thereupon procured a certificate for five barrels of other whisky, and its secretary went to the bank and left the new certificate in pledge for P. J. Singer's note, and withdrew a certificate for five barrels of the desired brand. This was a clear recognition of the right of the bank to hold said certificate as security of P. J. Singer's note.

Fourth. A tax of \$2,933.70 on part of this whisky came due, and the bank paid it. It was not a debt of Singer & Wheeler direct, but it was a lien upon property in which Singer & Wheeler had at least the residuary interest. It does not appear Singer & Wheeler requested the payment, but it afterward ratified it.

Fifth. On June 1, 1894, another tax of \$2,950.90 came due on other parts of this whisky, and a draft was drawn on Singer & Wheeler therefor, and Singer & Wheeler on June 6, 1894, in writing requested the bank to pay said draft, with exchange, and the bank complied. Singer & Wheeler well knew for what purpose the bank held the certificates, and that the only reason why it would advance this money to pay the tax was to protect its security for

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P. J. Singer's debt. When Singer & Wheeler made this request it was a recognition of the bank's right.

Sixth. On June 23, 1894, Singer & Wheeler gave its note to the bank for \$5,956.48, the amount the bank had advanced for said taxes and interest. True, this was done to make the bank's books appear in proper condition, but still it was a ratification of the bank's action, and done with full knowledge that the bank's only reason for making such heavy advances was to protect its security for P. J. Singer's note.

Seventh. Part of the whisky was afterward sold by the bank, and said last note of Singer & Wheeler paid from the proceeds, and a surplus applied upon the note of P. J. Singer, and no objection to that action was made by Singer & Wheeler.

Eighth. From September 14, 1893, till January 10, 1896, two years, three months and twenty-seven days, Singer & Wheeler was not merely a going concern, but it was doing a very heavy business. It did a business of one million dollars in 1893, nearly one million in 1894, and nine hundred thousand in 1895. During all that time it never questioned this transaction, never sought to repossess itself of these warehouse certificates, and never even asked for them. The proofs show that in September, 1893, P. J. Singer, though perhaps in fact secretly insolvent, was known to the public as solvent and a man of large means. He was insolvent before the assignee first questioned the validity of this pledge. The bank had been lulled into security by the possession of these warehouse certificates, and by the acts and conduct of Singer & Wheeler in reference thereto. In our judgment, after such long silence, Singer & Wheeler ought not now to be permitted to deprive the bank of its security. Indeed we are of the opinion that the facts and circumstances, and the absence of claim by Singer & Wheeler above stated, and the lapse of time during which the pledging of these certificates went unchallenged by Singer & Wheeler, justifies the inference that the pledging was with the assent of the corporation. L., N. A. & C. Ry. Co. v. Carson, 151 Ill. 444.

The rulings of the court below, upon the propositions of law submitted by plaintiff, were in harmony with the views expressed in this opinion, and more fully in our former opinion. The proposition modified and given covers the case. Special complaint is made of the refusal of proposition No. 1. It is open to the construction that the court was thereby to say that plaintiff was not estopped to show that P. J. Singer had no right to pledge these certificates to secure his own debt. That was in part a question of fact upon which the court can not be required to pass under the guise of a proposition of law. If the proposition did not mean that, then it stated a self-evident proposition which should have been given. But even if it were error to refuse it, the error should not reverse, for we are of opinion the judgment is right. The judgment is affirmed.

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### H. P. Stitt v. Peter Kurtenbach.

1. **PRACTICE**—*In Suits Against Joint Contractors*.—In a suit against two joint contractors, both in court, it is reversible error to enter judgment against one without proceeding at the same time to judgment as to the other, and without including him in the judgment, unless he has shown some defense personal to himself arising after the joint contract was made.

2. **SAME**—*Jurisdiction to Vacate Judgments After the Term*.—Where judgment is rendered against a defendant and no motion made during the term to vacate it, the power of the trial court ends with the term, and it has no jurisdiction to vacate it at a succeeding term.

3. **JUDGMENTS**—*When Interlocutory—When Final*.—Where there is a judgment by default against a defendant, reciting that "plaintiff ought to recover his damages," but not fixing the amount, such a judgment is interlocutory; but where the amount is fixed the judgment is final.

4. **AMENDMENTS**—*During the Term*.—During the term all proceedings rest in the breast of the judge of the court, and he can, without notice, amend his record according to the facts within his knowledge of what he has or has not done.

5. **SAME**—*After the Term*.—The court, upon notice to the parties in interest, may amend its record at a subsequent term after judgment, if there is some minute or memorial paper, or notes of a stenographer or other like record, from which it can be determined what the order to be amended in fact was, but such amendment can not be based upon oral evidence merely.



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**Assumpsit, on a promissory note.** Trial in the County Court of Livingston County; the Hon. C. M. BARICKMAN, Judge, presiding. Finding and judgment for defendant; appeal by plaintiff. Heard in this court at the May term, 1899. Reversed and remanded with directions. Opinion filed October 12, 1899.

A. C. NORTON and F. W. WINKLER, attorneys for appellant.

Where bond is filed with justice an appellee is not entitled to notice of appeal, but must follow it. *Messervey v. Beckwith*, 41 Ill. 452; *Fix v. Quinn*, 75 Ill. 233.

During the term, in contemplation of law, the record is in the breast of the court, and amendments of the record may be made; but after a final judgment has been entered, and the term of court has closed, no steps having been taken to vacate the same, the court at a subsequent term has no power to alter or amend its final judgment. *Cook v. Wood*, 24 Ill. 297; *Messervey v. Beckwith*, 41 Ill. 452; *Hibbard v. Mueller*, 86 Ill. 257; *Baldwin v. McClelland*, 152 Ill. 50.

Amendments of the record may be made at a subsequent term, but notice must be given the parties affected by it and there must be something in the judge's minutes to amend by. *Church v. English*, 81 Ill. 442; *Weinhard v. Tynan*, 53 Ill. App. 27, and cases cited.

J. A. BROWN, attorney for appellee.

A judgment to be final must definitely put the case out of court. It must dispose of the rights of all the parties concerned on the merits of the case and terminate the litigation between the parties, before it can be considered final with respect to any one of them. The judgment, to be final, should determine all the issues of fact involved in the case; the decision of one of them, leaving the others undetermined, is not a final adjudication, as there can not be two final judgments in the same action. If one of the defendants suffers a default, and an interlocutory judgment is entered up against him, it can not be made final until the case is finally disposed of as to the other defendants. There must be a final disposition of the whole case as to all the parties.

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Black on Judgments, Secs. 21, 23, 24, and 206; Anthony v. Ward, 22 Ill. 181; Gade v. Forrest, etc., Co., 158 Ill. 39; Chicago & N. W. Ry. Co. v. City of Chicago, 148 Ill. 141; Lawrence v. Paden, 76 Ill. App. 510; Shinn's Pleading and Practice (common law), Sec. 989.

An interlocutory judgment determines some preliminary or subordinate point or plea or settles some step or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties or finally put the case out of court. A judgment by default against one defendant, before case is disposed of as to the other, is an interlocutory judgment; such judgment can not be made final until the case is finally disposed of as to the other defendant; the issue pending with the co-defendant would have to be disposed of before final judgment could be entered against the party defaulted. Black on Judgments, Secs. 21, 28, 82, 206, 209 and 308; Anthony v. Ward, 22 Ill. 181; Mowatt v. Cole, 59 Ill. App. 345.

MR. JUSTICE DIBELL delivered the opinion of the court.

H. P. Stitt was the assignee of a note for the principal sum of \$137, dated March 2, 1897, payable to John F. Oliver, or order, twelve months after date, with interest at seven per cent, purporting to be signed by Peter "Kertenbaugh" and Revilo Oliver, and indorsed in blank by John F. Oliver. Stitt brought suit thereon against the Olivers and Peter Kurtenbach, before a justice of the peace of Livingston county. Each defendant was served with summons. The transcript of the justice shows that plaintiff and Revilo Oliver appeared (implying John F. Oliver did not appear), and that upon the trial the justice adjudged that the note was a forgery as to the alleged makers, and discharged them, and entered judgment against John F. Oliver, the indorser, for \$147.60 and costs. Plaintiff appealed to the County Court as to the judgment obtained by the makers against him, and no further notice was taken of John F. Oliver or the judgment against him. As John F. Oliver was liable severally, and the makers jointly, if at all, the course

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pursued of taking judgment against the party severally liable (who apparently was defaulted) and thereafter treating the suit as severed and proceeding further against the makers only, seems within the spirit of section 3 of the act of June 4, 1895. At any rate no error is assigned upon the severance thus effected.

At the December term, 1898, of the County Court, Revilo Oliver obtained a continuance, and there was a jury trial as to defendant Kurtenbach, and a verdict was rendered for plaintiff for \$154, upon which at that term plaintiff obtained a judgment final in form against Kurtenbach for \$154 and costs. No further steps were taken at that term. At the next term, being the March term, 1899, plaintiff and Kurtenbach appeared, and Kurtenbach moved to vacate the verdict and judgment against him at the former term, and plaintiff entered his motion to dismiss the suit as to Revilo Oliver. The motion of Kurtenbach was heard upon proofs presented and was granted, and plaintiff excepted. The court then granted plaintiff's motion to dismiss the suit as to defendant Revilo Oliver. A jury was then waived by plaintiff and Kurtenbach, and proofs were heard, and the court found the issues for said defendant Kurtenbach, and entered judgment in favor of Kurtenbach against plaintiff. Plaintiff obtained and perfected an appeal to this court. After plaintiff's appeal bond was filed and approved certain other proceedings were had in said court, which will be stated further on.

If the court had jurisdiction at the March term, 1899, to vacate the verdict and judgment against Kurtenbach at the December term, 1898, then, without undertaking to state the proofs, we deem it sufficient to say that the showing made in support of Kurtenbach's motion fully justified the vacation of said verdict and judgment; and the proof required the finding and judgment in favor of Kurtenbach at the March term, 1899. But plaintiff contends that the judgment against Kurtenbach at the December term was final as to Kurtenbach, and that the court had no jurisdiction to vacate said judgment at the succeeding March term. It is settled in this State that in a suit against two alleged

joint contractors, both in court, it is reversible error to enter judgment against one defendant without proceeding at the same time to judgment as to the other defendant, and without including the other in the judgment, unless he has shown a defense personal to himself arising after the joint contract was made. So far as we can now see, if Kurtenbach had brought to this court, by writ of error, the judgment rendered against him at the December term, it must have been reversed for the reason stated. It is equally well settled in this State that where judgment is rendered against a defendant, and no motion is made at that term to vacate it, the power of the trial court over that judgment ends with the term, and that it has no jurisdiction to vacate it at a succeeding term. These rules are fixed by a line of decisions too numerous to justify any citation. Defendant Kurtenbach, however, contends that where the court improperly and erroneously proceeds to trial and judgment against one of two defendants alleged to be jointly liable, without disposing of the case as to the other defendant, the judgment rendered, though final in form, is treated as interlocutory only; and, that so long as the case remains pending as to the other defendant, the court retains complete control of the entire case, including said interlocutory judgment, and has the power at any time to vacate the same, and is in duty bound to do so, and to proceed to trial against both defendants at a succeeding term.

We have read and considered the many Illinois decisions cited in support of the contention last stated. To review them here would unduly extend this opinion. We are of opinion that most of them do not tend to support that position. Counsel for Kurtenbach gives in his brief several quotations from Black on Judgments apparently supporting the view he urges. It appears therefrom that such a rule does prevail in certain States where the practice is very different from that in force in Illinois. But counsel's reliance upon Black on Judgments appears to us to be mainly based upon a misconception of the sense in which that author uses the term "interlocutory judgments." In section 28

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Black shows that where there is a judgment by default against a defendant, reciting that "plaintiff ought to recover his damages," but not fixing the amount, such a judgment is interlocutory; but where the amount is fixed the judgment is final. That is good law in this State. (*Cook v. Wood*, 24 Ill. 295.) The judgment by default against one defendant spoken of as interlocutory only in *Anthony v. Ward*, 22 Ill. 180, was merely an entry of default prior to an assessment of damages, which afterward followed against both defendants before judgment for a sum of money was rendered.

In *Jones v. Wight*, 4 Scam. 338, in a suit against Wight and Jackson, in which both defendants were served, Jackson filed a plea. Without noticing the plea his default was entered, damages assessed, judgment rendered and execution issued against him. Afterward Wight filed a plea on which issue was joined, and upon a jury trial plaintiffs took a nonsuit as to Wight. Plaintiffs afterward brought a writ of error to reverse the judgment in their favor against Jackson, that they might commence their suit anew, and obtained its reversal. In an action at law, error will lie only to reverse a final judgment, and if this judgment against Jackson had been interlocutory only, the writ of error could not have been sustained. Similar judgments were treated as final, and subject to a writ of error, and not as merely interlocutory, in *Wight v. Meredith*, 4 Scam. 360, and *Wight v. Hoffman*, 4 Scam. 362. *Davidson v. Bond*, 12 Ill. 84, was a suit against six defendants upon a joint contract. A default and judgment was entered against four, without taking any notice of or action against two other defendants served. Plaintiff brought error to reverse this judgment. It was held, first, that this was an error for which defendants might at any time within five years have brought error and secured a reversal; and second, that said judgment presented a bar to plaintiff obtaining a regular judgment, and therefore he had a right to prosecute a writ of error and secure the reversal of the erroneous judgment. Under the theory advanced by appellee here, the judgment against the

four defendants was interlocutory only, and the trial court at any succeeding term had power to set it aside and proceed regularly against all six defendants. The Supreme Court, however, held it a final judgment which could be reversed on error, and till so reversed a bar to further proceedings against the other defendants. In *Jansen v. Grimshaw*, 125 Ill. 468, judgment was rendered at the March term, 1886, against two of three joint promisors, and the doctrine is clearly recognized that this was a final judgment and a bar to a recovery against the remaining joint contractors. The trial court set this judgment aside at the October term, 1886, and that action was approved, but for reasons wholly in harmony with the rule followed in the cases we have already cited. Immediately following the judgment at the March term, on the same day, was an order removing the entire cause to the United States Circuit Court. This order was erroneous, but suspended the jurisdiction of the State courts. That jurisdiction was restored by an order of the Federal court remanding the cause to the State court. Immediately upon the convening of the State court thereafter plaintiff moved to vacate said judgment against the two defendants. The intervening time when the court had no jurisdiction was treated as if it had not been, and the motion was treated as having been made immediately after the judgment was rendered. It was held the court resumed the jurisdiction it had at the time of removal. It was conceded that but for that extraordinary event the court would have had no power at the October term to vacate the judgment erroneously entered at the March term. It seems to us that on principle these cases determine that the judgment against Kurtenbach at the December term was final, and a bar to further proceedings against the other defendants till reversed by a higher tribunal.

There are two Illinois cases not wholly in harmony with the foregoing. In *Teal v. Russell*, 2 Scam. 319, the defendants were Peyton, McClure and Russell. Peyton filed a plea. Default and judgment were rendered against McClure and Russell. At the next term both plaintiff and McClure

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moved to vacate said judgment. The court denied said motion, struck the case from the docket and gave Peyton a judgment for costs against plaintiff. Plaintiff sued out a writ of error and secured a reversal of both judgments. This was in harmony with the holding in the other cases we have cited, but the court there further said that the lower court should have set aside the judgment by default against McClure and Russell, implying the court had power to do so at the next term, when the motion was entered. Gould v. Sternburg, 69 Ill. 531, was a suit against Gould and Richardson on joint contracts. Final judgment by default was entered against both defendants. The default was afterward set aside as to Gould and he pleaded. At a later term there was a trial and a judgment against Gould alone. Gould brought a writ of error to reverse the judgment against him, and succeeded. This was in harmony with the other cases cited. The court said that the judgment should have been set aside as to Richardson as well as Gould, but for aught that appears the vacation of the judgment as to Gould may have been at the same term at which it was entered. But the court remanded the cause. Apparently there was no occasion to remand it unless the trial court could set aside the judgment against Richardson, for till that was done no further action against Gould could be taken in that cause. But plaintiff was still at liberty to bring error as to the judgment against Richardson and secure its reversal, and then he would be in a position to proceed against both defendants, and it was only by remanding the cause, the court could place the plaintiff in a position where that course could be effectively pursued. We conclude the rule best supported by the Illinois decisions is that the court below was without power, at the March term, to vacate the judgment rendered against Kurtenbach at the preceding December term.

The record of the December term, as certified by the clerk, does not show Kurtenbach present or taking part in the proceedings at that term. By a second bill of exceptions taken by plaintiff, it now appears that the record of

said December term, as originally written by the clerk, and as it stood when this case was tried and determined at the March term, and when plaintiff's appeal bond was filed and approved, showed Kurtenbach present and participating in the proceedings at the December term. After plaintiff's appeal bond had been approved at the March term the court, of its own motion and without notice to plaintiff, directed the clerk to so amend the record of the December term as to strike out so much as showed Kurtenbach taking part, and to show plaintiff took certain action which the record originally stated was by Kurtenbach. The clerk corrected the record accordingly. Thereafter, at said term, plaintiff learned of said action and excepted thereto, and preserved the action and exception by his second bill of exceptions, and has assigned error thereon.

During the term all proceedings rest in the breast of the judge of the court, and he can amend his record according to the facts within his own knowledge, and according to his own personal knowledge of what he has or has not done. (*Hansen v. Schlesinger*, 125 Ill. 230; *West Chicago St. R. R. Co. v. Morrison*, 160 Ill. 288.) This apparently the court may do without notice. (*Heinson v. Lamb*, 117 Ill. 549.) The court may amend its record at a subsequent term after judgment if there is some minute or memorial paper, or notes of a stenographer, or other like record, from which it can be determined what the order to be amended in fact was. Such amendment can not be based upon oral evidence merely. (*Ayer v. Chicago*, 149 Ill. 262; *Culver v. Cogle*, 165 Ill. 417; *Sullivan v. Eddy*, 154 Ill. 199.) But this must be upon notice to parties in interest. (*Church v. English*, 81 Ill. 442; *People v. Anthony*, 129 Ill. 218; *Adams v. Gill*, 158 Ill. 190.) As this record was corrected by the judge of the court at a subsequent term, and of his own motion and without notice to plaintiff, the action was erroneous, regardless of the question whether there was any sufficient memorandum upon which to base it. As the true condition of the record of the December term may affect the validity of that judgment, if hereafter questioned



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the error was material. For the correction of this error it will be necessary to remand the cause.

The judgment and proceedings at the March term are therefore reversed, and the cause is remanded to the court below, with directions to restore the record of the December term to its original condition, unless upon motion to amend the same, and due notice to the parties in interest, a proper case for the amendment thereof shall be made.

Reversed and remanded with directions.

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**Charles E. Johnston v. Abraham M. Hirschberg.**

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1. **FRAUD—Burden of Proof.**—The burden of proving fraud is on the party alleging it. It can not be presumed, but must be proved by evidence reasonably sufficient to establish it.

2. **SAME—Mutuality.**—To render a sale or conveyance fraudulent as to creditors of the vendor, there must be mutuality of participation in the fraudulent intent on the part of both the vendor and the purchaser.

3. **INSTRUCTIONS—Abstract Principles of Law.**—It is not error to refuse an instruction announcing a mere abstract principle of law.

4. **VERDICTS—Upon Conflicting Testimony.**—The verdict of a jury upon conflicting testimony is conclusive if there is substantial evidence to support it and the instructions are without error.

**Trespass, for taking personal property.** Trial in the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

H. C. FULLER, attorney for appellant; JAMES H. SEDGWICK, of counsel.

ISAAC C. EDWARDS and ISAAC J. LEVINSON, attorneys for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court. On October 17, 1895, Gans Brothers and Rosenthal sued out of the County Court of Peoria County an attachment

against Isaac D. Hurwitz for the sum of \$404.93, and placed the same in the hands of Charles E. Johnston, the sheriff of said county, and the latter seized thereunder a quantity of tobacco in the possession of Abraham M. Hirschberg, at his cigar factory in the city of Peoria, and also other tobacco in a storeroom in another building, all which tobacco Hirschberg claimed to own. The sheriff removed the property, and it was never returned to Hirschberg. On January 11, 1896, Hirschberg brought this action of trespass against Johnston, for seizing and carrying away said tobacco and converting and disposing of the same. Upon issues joined there was a jury trial, a verdict and a judgment for defendant, which judgment was reversed in *Hirschberg v. Johnston*, 74 Ill. App. 41, for errors in instructions. Upon a second trial plaintiff recovered a verdict, and a judgment for \$1,650, from which judgment defendant prosecutes this appeal.

Defendant filed six pleas. The first was not guilty. The second averred that the goods and chattels in question were the property of Hurwitz, and set up said attachment writ against Hurwitz, and the seizure of said property thereunder, and that this was the trespass complained of. Upon these pleas issues were joined. To the third, fourth, fifth and sixth pleas a demurrer was interposed and sustained. Defendant then filed amended third, fourth, fifth and sixth pleas, and plaintiff demurred thereto, and the demurrer was sustained. The record shows defendant elected to abide by said amended pleas; and the action of the court in sustaining said demurrer thereto is assigned for error. We are of opinion no error in that regard appears: First, the supposed error is not argued by appellant in his briefs here, and it is therefore waived; second, the third, fourth and fifth amended pleas are certainly bad. Each presents a defense as to a part only of the goods and chattels in question, and then prays judgment of the entire cause of action. The sixth amended plea is contradictory, double, confusing and uncertain. It first alleges that all the goods described in the declaration were the property of Hurwitz (of which defense

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defendant had the benefit under the second plea). It then alleges that certain other parties claimed to own certain portions of said goods, particularly described, and that by certain judicial proceedings, said goods, particularly described, were adjudged to them, and that as to said goods particularly described plaintiff is barred from maintaining his action; and that the seizure of said goods particularly described (which the plea had just admitted were only part of the goods described in the declaration), was the only trespass alleged in the declaration.

Hirschberg proved, without any direct contradiction, that he had negotiated with Hurwitz, a cigar manufacturer in Peoria, for a part of his stock, some time before he bought, and offered to pay him seventy per cent of the invoice price; that afterward Hurwitz sold part of his stock to one Meirs, and removed to a new location; that the negotiations were renewed, and on October 4, 1895, Hirschberg bought of Hurwitz a part of his remaining stock; that they weighed the tobacco then bought, and it came to 1,993 pounds; that the bills for said tobacco were examined and it was found to have cost between \$1,600 and \$1,700, and seventy per cent thereof came to \$1,137.50; that he gave Hurwitz therefor his check on the German American National Bank for \$800, and his note for \$337.51, due in thirty days, with interest at six per cent; that the check was duly paid at the bank; that Hurwitz assigned the note to M. J. Cohen as collateral security for \$275, which Hurwitz owed Cohen; that Hirschberg paid the note to Cohen shortly before maturity, and the latter deducted the \$275, and paid the balance to Hurwitz. Hurwitz was at this time making cigars in a room on the second floor of a building on Washington street, which room he rented from Cohen, who had control of the entire building, and occupied most of it for his business. As soon as Hirschberg made the arrangement to buy the tobacco he rented a first floor front room on Lincoln avenue (a mile and a half or two miles from the shop of Hurwitz), as a location for a cigar factory. As soon as he had paid for the tobacco he moved it to that place, except

two packages, which were so badly broken they could not easily be removed. He made an arrangement with Cohen to store those packages in a storeroom occupied by Cohen on the third floor of the Washington street building, and did remove and leave them there, and they remained there till the sheriff seized them under said attachment writ. On October 5th, the next day after Hirschberg bought and removed the tobacco, he applied for and obtained a government license to manufacture cigars, and a certificate of registry, and put a sign upon the front of the Lincoln avenue building, giving his name and the number of his shop and the number of his district. The check, the note, the bill of the goods, the bill of sale thereof and the government certificates in due form, were all in evidence. An attempt was made to show the goods were moved to Lincoln avenue in the night time, but this failed. The goods were moved late in the afternoon by daylight. When they reached the building previously rented, the owner thereof and his wife, who lived upstairs, were away, and Hirschberg had not obtained the key. He unloaded the tobacco on the sidewalk, and left it there in charge of a man till the owner of the building came home in the evening, and then moved it in. The entire transaction was as open and public as such a business could be conducted, and there is no direct evidence to rebut or overcome plaintiff's proofs. No doubt can be entertained that the parties observed all the outward forms of a sale of and payment for the goods and a complete change of possession. Hirschberg then made some tables and procured the necessary appliances for making cigars; purchased a lot of cigar boxes from a man engaged in making them; caused his own number to be put upon them; and after some delay hired either one or two cigar makers; had some preliminary work done preparatory to making cigars, and began their manufacture. The proof shows a man will make from fifty to two hundred and fifty cigars per day, depending upon the kind of work to be done. Hirschberg had three hundred and fifty cigars made when, on October 17th, the thirteenth

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day after he purchased the tobacco of Hurwitz, the sheriff seized the goods at Hirschberg's shop on Lincoln avenue, under the writ against Hurwitz. The tobacco left in Cohen's storeroom the sheriff seized a few days later under the same writ. It appears that various creditors of Hurwitz thereafter seized the stock he still had at his factory on Washington street, and his tools, and he was thereby driven out of business, and, as a witness for defendant stated, Hurwitz then "failed for several hundred dollars."

Under this evidence plaintiff was clearly entitled to recover the value of the property taken unless the transaction was in fact colorable only, or was conducted with the intent, on the part of Hirschberg as well as Hurwitz, to cheat and defraud the creditors of Hurwitz. (*Schroeder v. Walsh*, 120 Ill. 403.) For this proof the defense relied upon various circumstances, mostly derived from the direct and cross-examination of Hirschberg. Mrs. Hurwitz was a sister of Hirschberg, and Hirschberg had boarded and roomed at Hurwitz's home most of the two years he lived in Peoria. Hirschberg deposited the \$800 in the bank the day he delivered Hurwitz the check for that amount. He had never before made deposits of any large sums in any bank, and but few small ones. He never owned any real estate. During the preceding three or four years he had worked for various persons and firms in several different kinds of business in a number of different towns at \$7.50, \$9, \$11.50, and \$12.50 per week, and \$55 per month; had lived very economically, and had frequently been out of work for a short time. Hirschberg had clerked in a cigar store, but he had never made cigars. The cigar business was dull and had been for two years. The room he rented was sixteen feet square and not large enough for the business he might have conducted with the amount of tobacco he bought. It is argued he could not have saved this amount of money; that if he had had so large a sum it would have been in some bank; that he must have known that Hurwitz was in debt, and this tobacco not paid for. There is no proof, however, that he was acquainted with Hurwitz's

business affairs or debts, or knew the tobacco was not paid for. He may have supposed Hurwitz was selling the tobacco to raise money to pay his debts. Indeed, there is no proof Hurwitz did not use the \$800 in payment of his debts. That was the use to which Hurwitz put the note Hirschberg paid him.

Hirschberg testified he had the money, and that he made it when he was in the saloon business for fifteen months in Burlington, Iowa, prior to the time covered by defendant's inquiries, and that from that time on he always had a sufficient sum of money with which to have made this purchase. He produced a witness, Pinko, who had seen him several times with a roll of bills, and had twice borrowed money of him, the last sum being \$120, which he paid back to Hirschberg by a check which was in evidence, and was dated October 4, 1895, and put through the Peoria clearing house and paid the same day, which was the day Hirschberg made the purchase of Hurwitz. It can not be supposed Pinko drew this check and put it through the clearing house, and had it paid out of his bank account at that date, when he owed Hirschberg nothing, simply in order to help manufacture false evidence for Hirschberg to use years afterward. No doubt Hirschberg received \$120 of his own money from that source that day. Hirschberg claimed to have been for some time hunting for a suitable business in which to invest his money. Stein, a merchant tailor, testified that a few months before October, 1895, Hirschberg told him he had some money and wanted to go into some business, and that at his request Stein took Hirschberg into his employ that he might learn his business; that Hirschberg worked for him about two months and did not like the business; and that while with him Hirschberg investigated as to the price of goods and amount of capital it would take to run the business. If the cigar business was dull, as defendant proved, then the act of Hurwitz in selling, and of Hirschberg in buying, for seventy per cent of the cost price, does not subject the transaction to as much suspicion as it might if the business had been prosperous. Indeed, this

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tends to show the prudence and caution of a genuine buyer. If the parties had been arranging a mere colorable transaction, and Hurwitz remained the real owner, as is here argued, they would have been much more likely to make the apparent consideration the cost price of the goods or more. A witness for the defendant testified the property taken by the sheriff from Hirschberg was worth \$2,000, and was a staple article for which there was a ready market value. If so, defendant is all the more subject to the charge which the evidence supports, of making an excessive and oppressive levy in seizing it all upon a writ for \$404.93. There are several other circumstances in evidence relied upon for and against plaintiff's title to the goods, but we think we have discussed the evidence sufficiently to show that we would not be warranted in holding that it fails to support the verdict. If the testimony of the plaintiff was true he was entitled to recover, and while there are some circumstances casting suspicion upon the transaction, they only create suspicions. The jury believed plaintiff, and we can not say they erred in doing so.

We are of opinion that the court did not err in the rulings upon evidence discussed by counsel. Objections were sustained to the answers of defendant's witness Waller to several questions. An examination of his entire deposition in the record shows he spoke in the main from hearsay, and that the several rulings were correct. In an answer to which the court sustained an objection, Waller stated Hirschberg had been traveling about from pillar to post, had no money or property to speak of, and on October 1, 1895, admitted he owned no real estate. Waller had already testified he never met Hirschberg, but saw him in court in 1897. It is manifest the answer above stated merely repeated what some one else told him. The court below properly sustained an objection to Waller's description of the room on Lincoln avenue, for he had already stated he only saw it in 1897, and that his only knowledge it was in the same condition as when Hirschberg occupied it in October, 1895, was that the landlord told him so. The

landlord, French, had been upon the stand, and defendant failed to prove by him that the room was in the same condition in 1897 as in October, 1895. After Waller had testified he had had no practical experience as a cigar maker, it was proper for the court to sustain objections to questions put to him on the assumption he was an expert in that business. The court was not bound to admit a memorandum from the books of the bank, showing Hurwitz' bank account. If competent at all, the books should have been produced. This was not even a copy from the book of original entry, but from the ledger, itself a copy. The schedule made by Hurwitz on October 24, 1895, was a declaration by the seller long after the sale, and could not be used to affect the buyer's title. If the financial condition of Hurwitz on October 24th was material, Hurwitz and others could have been called to testify thereto. Miller's testimony that Hirschberg "acted to me as though he was pretty near busted" was properly excluded. That was the conclusion of the witness, who should have stated facts only. The other evidence excluded was of like character.

Plaintiff's third instruction is subject to criticism in making plaintiff's right to recover turn upon his ownership of the property, overlooking the defense set up that he bought it with intent to cheat and defraud the creditors of Hurwitz, in which case they could assail a title good as between Hirschberg and Hurwitz. But the effect of a fraudulent intent and lack of good faith in the purchase was stated in plaintiff's fourth, fifth, sixth and eighth instructions, and in instruction "Bm" given for defendant. Several of defendant's refused instructions were abstract propositions of law, and therefore properly refused. Others made prominent a single item of evidence disconnected from the rest. Others were contained in the instructions given. The fifth implied plaintiff took possession of only part of the property, and the evidence did not justify such an assumption. We find no substantial error in the rulings upon the instructions. As a series they seem to state with sufficient fullness the law governing the case. The judgment is affirmed.



**Charles B. Saunders v. Charles E. Hartsook.**

1. **BAILMENTS—For the Benefit of Both Parties—Care Required.**—Where a mare is left with the owner of a stallion for the purpose of breeding her, and incidentally of keeping her in the pasture of the owner of the stallion, the latter does not, in the absence of a special contract, become an insurer of her safety from accidents, but is only bound to exercise reasonable care and diligence for her safety.

2. **SAME—Reasonable Care Defined.**—The reasonable care required in cases of property is such care as a reasonably prudent man would exercise toward the safety of similar property under similar circumstances.

3. **SAME—Special Contracts a Question of Fact.**—The question as to whether there was a special contract between the parties for the care of the property, and if not, whether ordinary care for its safety was exercised by the bailee, are questions of fact for the jury.

**Action in Case.**—Appeal from the Circuit Court of Knox County; the Hon. GEORGE W. THOMPSON, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

J. A. McKENZIE, attorney for appellant.

COOK & STEVENS, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was an action brought by appellant against appellee to recover damages for the loss of a certain mare, claimed to have been injured upon a fence partially constructed of barbed wire, while in the pasture of the latter.

The declaration, as amended, charges in the first count that the mare was injured because appellee did not exercise reasonable care for her safety; and, in the second, that she was placed in charge of appellee under a special contract, by the terms of which she was to be kept in a certain pasture; that she was in the first instance placed in such pasture, but was afterward removed by appellee to another and smaller pasture, where she received the injuries complained of; that the changing of said mare from one pasture to another was contrary to the agreement, and was not the

exercise of due and proper care or caution in the care of said mare on the part of appellee.

The case was instituted in the County Court of Knox County, where, upon trial, the jury gave a verdict for appellee. A new trial having been granted, the venue was, by consent, changed to the Circuit Court of the same county, where there was also a trial before a jury, and a verdict for appellee. A motion for a new trial having been overruled, judgment was entered against appellant for costs. It is urged by appellant that the verdict of the jury was contrary to the evidence and that the court erred in regard to the instructions in the case.

It appears from the evidence that in the summer of 1896 appellant took four mares to appellee's place to be left there for breeding purposes, among them a mare named "Monosh." Appellee informed appellant that he had a large pasture of some forty acres, and also a smaller pasture adjoining, of some six acres, but he needed the latter for his own use and would put the mares in the other pasture. Both of the pastures were inclosed by fences in which barbed wire was used. Appellant had informed appellee that the mares were not used to barbed wire, but after having examined the large pasture he said he would risk it, and that he would leave them there. The mare "Monosh" was very difficult to catch, and on two occasions, when in the large pasture, she had to be substantially run down and cornered before she could be caught. This interfered seriously with the purpose for which she was placed with appellee and he therefore took her out of the large pasture and placed her in the smaller one. While in the latter she in some manner became entangled in the wire of the fence, and received injuries from which she afterward died. The object of placing the mare with appellee was to breed her to a stallion owned by appellee, and not to pasture her. The pasturing was only incident to the principal object. Appellant gave appellee minute instructions concerning the breeding of the mare, and the change from the larger to the smaller pasture was made in order that those instructions

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might be more easily and fully carried out. The mare was left with appellee by appellant for the joint benefit of both parties, and under such circumstances the former was, in the absence of a special contract, only bound to use ordinary care for her safety. *Standard Brewery v. Malting Co.*, 171 Ill. 602. The question as to whether there was a special contract between the parties for the care of the mare, and if not, whether ordinary care for her safety was exercised by appellee, were both questions of fact for the jury. *Mansfield v. Cole*, 61 Ill. 191; *Stock Yard Co. v. Mallory*, 157 Ill. 554.

The evidence was to some extent conflicting, but two juries have passed upon the question, both of whom have found in favor of appellee, and we will therefore not disturb the verdict on account of any question growing out of the facts in the case.

The instructions given for appellant fully expressed his theory of the case, and the only one refused for him was covered in effect by the instructions given. Appellant complains of instructions four and five, given for appellee. These instructions told the jury in effect that if they believed from the evidence that appellee received the mare of appellant on his farm for breeding purposes, and that she was left there for such purpose, appellee did not thereby become an insurer of her safety from all accidents, but was only bound to exercise reasonable care and diligence for her safety, and the reasonable care required was explained as being "such care as a reasonably prudent man would exercise toward the safety of similar stock under similar circumstances." We think these instructions, under the circumstances of the case, fairly presented the law and were free from error. *Standard Brewery v. Malting Co.*, *supra*.

Instructions six and seven, complained of by appellant, undertook to inform the jury as to the duty incumbent upon the appellee in regard to the care and treatment of the mare after she had received her injury. The question of the treatment of the mare after she was injured had been entirely eliminated from the case by the amendment of the second count of the declaration after the evidence was

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all in. The instructions in question were prepared to meet the case as it was originally presented, and there was no reason for offering them after the amendment was made. They could not, however, have prejudiced appellant's case, and if there was any error in giving them it was entirely immaterial.

Upon a consideration of the whole case we find no material error, and the judgment of the court below will therefore be affirmed. Judgment affirmed.

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**William F. Thomas et al. v. Sanford Sellers.**

1. **APPEALS**—*In Trials of the Right of Property*.—An appeal in a trial of the rights of property under the statute (Chap. 140a, Sec. 1, Hurd's Statutes, 1898, p. 1457) is properly taken to the Appellate Court.

2. **SAME**—*Trials of the Right of Property—Repeal by Implication*.—A trial of the rights of property under the statute is a proceeding at law, and the act of 1887 (Laws of 1887, 156) conferring jurisdiction upon the Appellate Court in all matters of appeal or writs of error from the final judgments, orders or decrees of the Circuit or County Courts in suits or proceedings at law (Rev. Stat. Chap 37, Sec. 8), repeals, by implication, Sec. 122 of the County Court act of 1874, providing for appeals from judgments of the County Courts to the Circuit Courts.

3. **CHATTEL MORTGAGES**—*Notes Secured by, Must Have Written Across Their Face "Secured by Chattel Mortgage"*.—Writing across the face of a note secured by a chattel mortgage the words "Secured by mortgage" is not a compliance with the act of 1895 (Laws of 1895, 260) requiring notes so secured to state the fact upon their face.

**Trial of the Rights of Property**.—In the County Court of Putnam County; the Hon. JOHN McNABB, Judge, presiding. Finding and judgment for claimant; appeal by defendant. Heard in this court at the May term, 1899. Reversed, with a finding of facts. Opinion filed October 15, 1899.

L. C. HINCKLE and ARTHUR KEITHLEY, attorneys for appellants.

A chattel mortgage securing a note which fails to state upon its face that it is so secured, as required by the act of 1895, is absolutely void. *Quaintance v. Badham*, 68 Ill. App. 87.

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It is fraudulent *per se* to leave personal property with the mortgagor after the purchase of the same by the mortgagee at mortgage sale. Thompson v. Yeck, 21 Ill. 73.

"A, having sold goods at public sale under a chattel mortgage, purchased them himself, and allowed the mortgagor to retain possession of them, taking his receipt therefor. Held, that the goods, being in the mortgagor's possession after the sale, were liable to attachment." Thompson v. Yeck, 21 Ill. 73.

JAMES E. TAYLOR and ALFRED R. GREENWOOD, attorneys for appellee.

An appeal in this case lies only to the Circuit Court for the reason that it is not a judicial proceeding. Rowe v. Bowen, 28 Ill. 116; Pease, etc., v. Waters et al., 66 Ill. App. 359; Robeson et al. v. Lagow, 73 Ill. App. 665; Grier v. Cable, 159 Ill. 29.

Appellee also contended that it is not material in this case whether the note secured by chattel mortgage recited that it was so secured or not, the mortgagee having taken the property into his possession and sold it before the execution mentioned became a lien. Whisler v. Roberts, 19 Ill. 274; Frank v. Miner, 50 Ill. 444; Chipron v. Feikert et al., 68 Ill. 284; Jones on Mortgages, 452; Gaar, Scott & Co. et al. v. Hurd et al., 92 Ill. 315; Ream et al. v. Stone et al., 102 Ill. 359.

The act of 1895, in requiring notes secured by chattel mortgages to so recite upon their face, has reference only to the assignment of notes secured by chattel mortgages. A note having no such recital upon its face would be void in the hands of an assignee of the note, but not as between the payee and maker of the note. See title of the act of 1895; Rev. Stat., Chap. 95, Sec. 1; S. & C. An. Stat., Vol. 3, p. 2774.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was a proceeding in the County Court for the trial of the right of property in certain chattels which were

claimed by appellee under an alleged chattel mortgage, executed to him by his brother, David Sellers.

Appellants obtained judgment against David Sellers, and caused an execution to be levied upon the property in controversy. Appellee gave notice of a trial of the right of property under the statute. (Chap. 140a, Sec. 1, Hurd's Statutes 1893, p. 1457.)

This proceeding followed. A jury was waived and the cause being tried by the court, judgment was rendered in favor of claimant below (appellee here) and the defendant appealed to this court.

Appellee has entered his motion to dismiss the appeal, on the ground it was improperly taken to this court, and that we are without jurisdiction to hear and determine the same. As this motion was taken with the case it will be first disposed of: The contention of appellee is, that the appeal should have been taken to the Circuit Court.

The statute conferring jurisdiction upon this court, as amended in 1887, provides that it shall "have jurisdiction of all matters of appeal or writs of error from the final judgments, orders or decrees of any of the Circuit Courts, or the Superior Court of Cook County, or County Courts \* \* \* in any suit or proceeding at law, or in chancery, other than criminal cases, not misdemeanors, and cases involving a franchise or freehold, or the validity of a statute." (Rev. Stat., Chap. 37, Sec. 8.)

It was held in *Union Trust Company v. Trumbull*, 137 Ill. 146, that the amendment of 1887 was a repeal by implication, of Sec. 122 of the County Court act of 1874, providing for appeals from judgments of the County Courts to the Circuit Courts.

If this is a "suit or proceeding at law or in chancery," then the appeal is properly taken to this court under the law as amended in 1887. To all intents and purposes, a trial of the right of property as provided for in the statute, is but another form of the action of replevin, without formal pleadings, whereby parties may have their rights determined in a more speedy and expeditious manner, and without the

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necessity of giving bonds. A proceeding somewhat analogous to this was known to the common law. Where the sheriff had levied a distress upon goods and chattels which were sought to be replevied from him by the party distrained upon, if the distrainor claimed a property in the goods taken, the party replevying was required to sue out a writ *de proprietate probanda*, and then the sheriff was bound to try by an inquest or jury, in whom the property previous to the distress subsisted; and if it were found to be in the distrainor, the sheriff could proceed no further, but must return the claim of property to the Court of King's Bench or Common Pleas, to be there further prosecuted, if thought advisable, and there finally determined. (3 Bl. Com. 148.) We are disposed to hold that this was a proceeding at law, and that the amendment of 1887 above referred to, repealed, by implication, section 11 of the Trial of Right of Property act.

We have been referred to the cases of *Pease v. Waters*, 66 Ill. App. 359, and *Robeson v. Lagow*, 73 Ill. App. 665, as sustaining a contrary view; but however much respect we entertain for the courts in which those decisions were rendered, we feel constrained to follow our own opinion above expressed, rather than those in the cases cited, in one of which the question does not seem to have been before the court, and what was said upon that subject must therefore be regarded as *obiter dictum*; especially is this so in view of the fact that the same court, in an earlier case, expressed a contrary opinion. (*McGowan v. Duff*, 41 Ill. App. 57.) Our conclusion upon this branch of the case is, that the appeal was properly taken to this court, and the motion to dismiss must be denied.

The facts of the case appear to be that for many years appellee had been living with, and working for, his brother, David Sellers; that on January 4, 1898, David Sellers executed to appellee what purported to be a chattel mortgage, covering the property in controversy, to secure a certain promissory note for \$834, payable in two years, with interest at six per cent per annum. Written across the face of

the note were the words "secured by mortgage." On March 23, 1899, appellee assumed to take possession of the property, and advertised it for sale, under the mortgage. He procured an auctioneer to cry the sale and himself became a purchaser of most of the property. After such alleged sale the property was permitted to remain on the farm the same as before, the horses being returned to their own stalls in the stable on the place, and being fed with grain and hay belonging to David Sellers, the mortgagor. Appellants having obtained a judgment against David Sellers, upon which an execution was issued, they caused a levy to be made upon the property, after the sale, whereupon these proceedings followed, as we have herein above first stated.

The main question for our determination is as to the validity of the chattel mortgage, because appellee's sole claim to the property in controversy is under the mortgage. We had occasion to consider this question in *Quaintance v. Badham*, 68 Ill. App. 87, and we there held that for want of the statutory requirement, viz., that the notes should show upon their face that they were secured by chattel mortgage, the mortgage was absolutely void. We do not feel authorized to place such a construction upon the statute as will fritter away its plain intent and meaning. It is true there was an attempt in this case to comply with the statute, but we can not hold that the words "secured by mortgage" are equivalent to saying that they were secured by chattel mortgage. But it is contended that appellee took possession of the property before the lien of the execution attached, and therefore it is immaterial whether the note bore upon its face the statutory requirement or not, it being argued that this provision of the statute has reference only to the assignment of such notes. Undoubtedly the object of the statute was to protect the makers of promissory notes secured by chattel mortgage, as against the claims of the assignees thereof, in fraud of the rights of the mortgagor; but it was evidently the intent of the legislature to provide as a penalty for a failure to comply with the statute, that the mortgage itself should be void. If void, no rights whatever could be predicated upon the mortgage.



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But the taking possession, selling the property, its purchase by the mortgagee, and its retention upon the farm under the same circumstances as before the sale, all seem to cast some suspicion upon the question of good faith in the transaction. An examination of the mortgage in the record fails to show that appellee had a right to become a purchaser at his own sale under the alleged mortgage. Yet he purchased most of the property himself, and instead of removing it, simply permitted it to remain apparently in the possession of the mortgagor, the same as before. It is unnecessary to cite authority to show that a mortgagee of chattels can not so deal with them, and hold the property as against *bona fide* creditors, seeking to levy thereon. Our conclusion is that the judgment was erroneous and must be reversed. But as we are of the opinion that upon the facts appellee is not entitled to recover the property, the cause will not be remanded.

**Finding of Facts** to be made a part of the judgment: We find as a fact that the note intended to be secured by the mortgage bore upon its face the words, "secured by mortgage," and did not show that it was secured by a chattel mortgage.

We further find as a fact that appellee bases all his claim to the property on this supposed chattel mortgage.

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Western Tube Co. v. John Zang.

1. **RELEASE—Of One Joint Wrong-doer.**—A release of one joint wrong-doer, discharges all. But a release to, or the receipt of money from one who is not in fact liable jointly with another, will not discharge such other.

**Action in Case,** for injuries caused by chemicals. Trial in the Circuit Court of Henry County; the Hon. WILLIAM H. GEST, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

CHAS. K. LADD, attorney for appellant.

WILSON & MOORE, attorneys for appellee.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was an action on the case by appellee against appellant, a manufacturing corporation, to recover damages for injuries done to the plaintiff's pasture, grass, animals, and ice pond, caused by mingling oils, acids, copperas and chemicals, from the defendant's manufacturing plant, with water flowing across, over and upon the plaintiff's premises.

The declaration sufficiently stated a cause of action for these alleged injuries, and the defendant pleaded the general issue. Upon a trial by jury the plaintiff obtained a verdict for \$100, upon which judgment was entered, after a motion for new trial was overruled, and the defendant prosecutes this appeal.

Appellee was a butcher and carried on a meat market as well as an ice business. He was the owner of the premises described in the declaration, through which flowed a clear stream of water prior to the injuries complained of, and he had constructed upon the premises a dam for the purpose of creating a pond, whereon he was accustomed to cut ice for his own use, as well as for sale. In the conduct of its manufacturing business, appellant was in the habit of using daily, large quantities of sulphuric acid for the purpose of cleaning the pipe manufactured by it, the acid being mixed with water in large pickling tanks, and, after the cleansing process was completed, the mixture of acid and water was flowed off into a pool or pond, constructed by appellant for its reception, which pool or pond was located some 600 or 700 feet from the pickling tanks. A more detailed description of the premises, or operations, is unnecessary to a fair understanding of the points in controversy. The contention of appellee is that this mixture of acid and water overflowed from the pool or pond of appellant over and upon his premises and caused the injuries complained of.

It appears from the evidence that not far from the manufacturing plant of appellant, the works of the Kewanee Gas Light & Coke Company are situated. Appellant contends, and offered to show, that the flow of tar, oil, ammonia and gas refuse from the gas works had flowed therefrom to the lands of appellee, and thereby caused a part of the injury complained of, and that the gas company had paid appellee the sum of \$500, in full satisfaction of all damages sustained by him on account of the flow of the refuse from the gas works; but the court refused to allow such proof of payment to go to the jury.

We will not discuss the evidence in detail, but it has convinced us that the appellee clearly proved the allegations of the declaration, and that the verdict was warranted by the evidence.

There is no doubt the rule is, that a release of, or receipt of full satisfaction from one joint wrongdoer, discharges all. But a release to, or the receipt of money from one who is not in fact liable jointly with another, will not discharge such other. (*Wagner v. U. S. Y. & T. Co.*, 41 Ill. App. 408, and cases cited.)

In the case at bar, we are satisfied from the evidence that appellant and the gas company committed separate and distinct offenses against appellee, and were in no way connected with each other or acting together, in any common purpose or intent; nor did the act of either tend to produce the injury done by the acts of the other. We hold that appellee had the right to receive from the gas company compensation for the injury it had done him, and such payment to him did not discharge appellant.

The court committed no error in refusing to permit proof of payment by the gas company and its discharge by appellee.

We think there was no reversible error in the instructions and the judgment must be affirmed.

**John Martens v. The People, etc., ex rel.**

1. **QUO WARRANTO**—*Granting Leave to File a Petition Discretionary.*—The granting of leave to file an information in the nature of a quo warranto is a matter of sound discretion in the court or judge to whom the application is made.

2. **SAME**—*Testing the Validity of a Dram-shop License.*—Quo warranto is a proper remedy to test the validity of a dram-shop license.

3. **CITIES AND VILLAGES**—*Power to Prescribe Terms to Dram-shop Keepers.*—Cities and villages incorporated under the general law have power to prescribe the terms upon which a license to keep a dram-shop in certain specified portions of the city or village may be obtained, but their action in the matter must be reasonable.

4. **FRANCHISE**—*What is Not.*—A license to keep a dram-shop is not a franchise.

**Quo Warranto**, to test the validity of a license to keep a dram-shop. Appeal from the Circuit Court of Rock Island County; the Hon. WILLIAM H. GEST, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

JOSEPH L. HAAS, attorney for appellant.

CHARLES J. SEARLE, State's Attorney, and S. W. O'DELL, attorneys for appellee.

PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

The State's attorney for Rock Island county filed a motion in the Circuit Court for leave to file an information against appellant in the nature of a quo warranto, stating that appellant claimed, and was attempting to exercise, the right to keep a dram-shop under a license issued to him by the mayor of the city of Moline on November 4, 1898, contrary to the ordinances of said city and the statute in such case made and provided. That no petition, as required by the ordinances of the city, accompanied the application for a license, and that no sufficient bond was filed by appellant, as provided by law. The motion was supported by affidavits; the leave was granted and the information filed.

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It appears from the allegations of the information that at the time the license was issued to appellant by the mayor of the city of Moline, there was an ordinance in force in said city to the effect that in any block where no saloon then existed, no license should be issued to keep a saloon in said block without a petition signed by two-thirds of the freeholders in such block praying that such a license be issued. It further appeared that when said license was issued, no saloon then existed in block No. 2, in South Moline, one of the additions to the city of Moline, where the license issued to appellant purported to authorize him to keep a saloon, and that no saloon had ever existed or been opened in said block. It is further averred that no application in writing was made to the mayor, as provided by the ordinances of said city, nor was any petition presented signed by two-thirds of the freeholders in said block, praying for the issue of such license as provided by the ordinances of the city above mentioned. And it was further averred that the bond filed by the appellant was not in compliance with the ordinances of said city in that behalf, in that it was not signed by two good and sufficient securities who were at that date freeholders in Rock Island county. Appellant entered his motion to vacate the leave to file this information, supported by affidavits wherein it was sought to show that the information was filed—not to subserve the public interests, but to gratify personal spite and prejudice, and for private and personal ends. On a hearing of this motion it was denied, and this action of the court is assigned for error.

The granting of leave to file an information in the nature of a quo warranto, is a matter of sound discretion in the court or judge to whom the application is made. *The People ex rel. v. The North Chicago Railway Co.*, 88 Ill. 537.

Although not incorporated in a bill of exceptions, and therefore not properly before us, we have examined the affidavits filed in support of the motion to vacate the leave, as well as those filed with the application for leave, and we can not say the court abused its discretion in denying the motion.

After the motion to vacate was overruled, appellant filed a general demurrer to the information, which was overruled by the court and he was ruled to plead. This he declined to do, and by refusing to plead further he must be held as electing to abide by his demurrer. Thereupon the court entered against appellant a judgment of ouster and a fine of \$250 and he appealed to this court.

As ground of reversal he insists *quo warranto* was not a proper remedy to test the validity of his license. We think this contention must be decided against him under the authority of *Swarth et al. v. The People ex rel.*, 109 Ill. 621, and *Matthews v. The People ex rel.*, 159 Ill. 399.

In the case first cited it was held by a majority of the Supreme Court that *quo warranto* is the proper remedy to test the validity of a license to keep a dram-shop.

In the last mentioned case, which was similar to the one at bar, the question does not appear to have been raised, and the case was decided upon other grounds; but in the face of the majority decision above referred to, we do not feel at liberty to regard the question as open to further discussion on our part.

We think the city council of the city of Moline had full power to prescribe the terms upon which a license to keep a dram-shop in certain specified portions of the city might be obtained, and that the ordinance in question was not unreasonable. (*The People ex rel. v. Creiger*, 138 Ill. 401; *Swift v. The People*, 162 Ill. 534.)

If the ordinance was valid, then before appellant could lawfully obtain a license he must have presented a petition signed by two-thirds of the freeholders of the block in which he sought to carry on the business of keeping a saloon. This, according to the allegations of the information, which are admitted by the demurrer to be true, he did not do; the license was therefore illegally issued and consequently void.

We deem it unnecessary to discuss the questions raised by the information as to the sufficiency of the bond. It is enough on that point to say that the demurrer admitted the allegations as to its insufficiency.

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As to the amount of the fine imposed we must assume that the court acted justly upon the evidence before it. It appears from the record that the court heard evidence upon that question, but it has not been preserved and presented in a bill of exceptions, and hence it is not before us. We are therefore not in a position to say the fine was not warranted by the evidence. On behalf of appellee it is urged that this court is without jurisdiction of the appeal in this case, for the reason that a franchise is involved, it being argued that a license is a franchise. In the *People ex rel. v. Matthews*, 53 Ill. App. 305, we held that a license to keep a dram-shop was not a franchise. We see no reason for changing the opinion then announced, and the arguments then used need not be again repeated. For the reasons given, the judgment will be affirmed.

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**Frank P. Wiley v. James H. Temple and Robert J. Dyatt, Surviving Partners, etc.**

1. **PARTNERSHIP—Effect of Agreement by One Party to Pay the Debts on Dissolution.**—Where a partnership is dissolved and one partner for a consideration agrees with the other to pay the firm debts, as between themselves, the partner so agreeing becomes the principal and the other a surety for him.

2. **SAME—Effect of Such an Agreement on the Creditors.**—Such an agreement does not affect the creditors of the firm who have no notice of it, but as to creditors having knowledge of the agreement the retiring partner is a surety only, and if the firm creditors, with full knowledge of the agreement between the partners, extend the time of payment to the partner continuing the business, the retiring partner will be discharged from liability.

3. **PRACTICE—Release of Surety—Evidence Under the General Issue.**—The defense of an extension of time to the principal debtor is admissible on behalf of the surety under the general issue.

**Appeal**, from the Circuit Court of Peoria County; the Hon. LESLIE D. PUTERBAUGH, Judge, presiding. Heard in this court at the May term, 1899. Reversed. Opinion filed October 12, 1899.

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G. T. GILLIAM, attorney for appellant.

COVEY & COVEY, attorney for appellees.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This is an action of assumpsit, by appellees against the former firm of Wiley & Drake, of which appellant was a member.

On January 13, 1897, while the partnership still existed, the firm of Wiley & Drake executed to appellees their five promissory notes for \$175 each, falling due respectively on the 10th days of May, June, July, August and September, 1897. Shortly after giving the notices the firm of Wiley & Drake dissolved partnership, appellant disposing of his interest in the firm to his partner, who took all the firm's assets and assumed all its liabilities. Two of the notes were paid, but the other three, together with an open account for \$37.42 remaining unpaid, appellees, in November, 1897, sent their agent, Horner, to look after the matter. Drake then told Horner that the firm of Wiley & Drake had been dissolved, and that he had assumed the liabilities and would pay these notes from his collections during the holidays. Horner, however, insisted upon some arrangement being made at once, and Drake thereupon paid \$100 in cash, gave his check for \$57.05, and his individual notes for the balance of the indebtedness. The new notes were not paid, and this suit was brought to recover the amount due upon the old notes and said open account, against appellant and Drake as copartners, summons issuing against both. Appellant was served, but as to Drake the summons was returned "not found."

The declaration is in the usual form, and appellant pleaded, first, the general issue; second, that he did not promise James A. Temple and Robert J. Dyatt, surviving partners, etc.; third, a plea admitting the giving of the notes but setting up his withdrawal from the firm and the assumption of the firm's indebtedness by Drake; averring that appellees were notified of the dissolution of the partner-



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ship and the terms thereof; that Drake had settled the firm's indebtedness to appellees with Horner, the agent of the latter; that new notes were taken and accepted in full satisfaction of the indebtedness of the firm of Wiley & Drake to appellees, whereby appellant was released; and also that Horner had promised to cancel and return the old notes of Wiley & Drake.

The issues having been made up, the cause was tried by a jury. After the evidence was all in the court directed the jury to return a verdict for appellees. Motions for a new trial and in arrest of judgment were made and overruled and the bill of exceptions contains all proper exceptions.

There is no controversy raised by the evidence in the case. The only evidence on the subject of the settlement and release was that of said Horner, who swore positively that he never released appellant, and, on the contrary, expressly told Drake that he would not do so until the account was actually paid in cash.

The only question necessary for us to consider is whether or not under the conceded facts appellant was liable for the debt. Where a partnership is dissolved and one partner agrees with the other, for a consideration, to pay the firm debts, as between themselves the partner making such promise becomes the principal and the other a surety for him. *Conwell v. McCowan*, 81 Ill. 285; *Chandler v. Higgins*, 109 Ill. 602.

This relation does not affect the creditors of the firm who have no notice of it, but as to creditors having knowledge of the agreement, the retiring partner is a surety only, and if the firm creditors, with full knowledge of the agreement between the partners, extend the time of payment to the partner continuing the business, the retiring partner will be discharged from liability. 24 Am. & Eng. Ency. of Law, 721, and cases cited.

Horner, the representative of appellees, was informed by Drake that the firm was dissolved, and that he had agreed with appellant to pay the firm debts. This charged appel-

lees with notice that appellant was only a surety. Afterward appellees extended the time of payment and accepted from Drake his notes, in which was included, in addition to the open account of the old firm and some indebtedness of Drake himself, the amount then due on the firm notes, with interest to that date. Upon these new notes Drake agreed to pay interest to a fixed date. This amounted to an extension of time, and operated to release appellant, who stood in the position of surety upon the indebtedness to appellee.

It is insisted, however, by appellee, that as appellant filed no special plea of release by reason of such extension of time, he can not take advantage of that defense in this suit. This position is not well taken, as there can be no question but the defense of an extension of time to the principal debtor is admissible on behalf of the surety under the general issue, though usually it is specially pleaded. *Warner v. Crane*, 20 Ill. 148; *Warner v. Campbell*, 26 Ill. 282; 1 Chitty Pl. 478.

For the reasons above stated, the judgment of the court below will be reversed; but as in our opinion appellant can not be held for the debt upon the merits of the case, the cause will not be remanded for another trial. Reversed.

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### Charles Burgett v. G. A. Strean.

1. CONTRIBUTION—*Between Co-sureties*.—A surety on a note is entitled to contribution from his co-surety when he is compelled to pay the note with his own money.

**Assumpsit**, for contribution. Appeal from the Circuit Court of Iroquois County; the Hon. ROBERT W. HILSCHER, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

C. W. RAYMOND and F. O. CAVITT, attorneys for appellant.

C. H. PAYSON and NELLY B. KESSLER, attorneys for appellee.

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MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

Appellee sued appellant, before a justice of the peace, to recover one-half of the amount due on a promissory note executed by J. M. Strean, G. A. Strean and appellee to W. A. Montgomery, for the sum of \$600. The note was dated February 14, 1896, and due January 1, 1897; J. M. Strean, the principal maker, paid all that was due on the note except \$355.20, prior to March 5, 1897, on which date appellant claims he paid the last named amount in full of the balance due, and brings this suit to recover one-half thereof, on the ground that appellee was a co-surety. In the Circuit Court there was a trial by jury, resulting in a verdict and judgment for appellee for \$177.60. A motion for new trial having been overruled, appellant prosecutes this appeal. The defense was that this sum of \$355.20 was paid out of the proceeds of property belonging to J. M. Strean, the principal, and not with the funds of appellee. All the facts were before the jury, and we think the evidence was sufficient to warrant the verdict.

It is contended here that there is no evidence in the record showing that appellant and appellee were co-sureties, but we think the evidence was sufficient to authorize the jury to find they were such sureties.

Both parties in the court below tried the case upon the theory they were co-sureties upon the note in question, and the only defense made was the one we have already mentioned, viz.: that the funds of the principal and not those of appellee paid the note. While one or two of the instructions may have been somewhat faulty, they were not sufficiently erroneous to require a reversal. The jury could not have been misled by them and the verdict was so clearly right that the judgment must be affirmed. Judgment affirmed.

**Hannah Newburg and John P. Newburg v. William L. Coyne.**

1. **USURY—Shifts and Devices.**—If usury has been taken, or is included in a mortgage sought to be foreclosed, and that is a continuance of the original indebtedness, no matter what shifts or devices have been resorted to, the defense is available, and a court of equity will relieve from its burdens.

2. **SOLICITOR'S FEES—Limited to the Amount Claimed.**—It is error to allow solicitor's fees in a foreclosure proceeding in excess of the amount claimed, without an amendment to the bill.

**Foreclosure.**—Appeal from the Circuit Court of Rock Island County; the Hon. WILLIAM H. GEST, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded, with directions. Opinion filed October 12, 1899.

JESSE E. SPENCER, attorney for appellants; SWEENEY & WALKER, of counsel.

J. T. KENWORTHY and S. R. KENWORTHY, attorneys for appellee.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was a bill in equity, filed by appellee against appellants, for the purpose of foreclosing a mortgage given by appellants to appellee, dated October 6, 1894, on certain premises in Rock Island county, to secure four promissory notes—three for \$500 each, payable respectively January 1 and August 1, 1895, and January 1, 1896; the fourth note was for \$2,694.73, due August 1, 1896. The two notes first mentioned, for \$500 each, were paid, and the controversy arises over the other two notes remaining unpaid.

The bill was filed April 22, 1896, after the third \$500 note became due, but before the maturity of the note for \$2,694.73. For the non-payment of the \$500 note the complainant declared the whole amount due, in accordance with the provisions of the mortgage. The bill alleged that

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the mortgage was given to secure the purchase money for the lands and tenements described therein, and that the notes for \$500 and \$2,694.73, respectively, were unpaid. That under the mortgage complainant was entitled to reasonable attorney's fees, which were a lien upon the premises, and that such reasonable attorney's fees were \$200, making a total amount which complainant claimed was due him of \$3,394.73 and interest. The bill prayed for an accounting, and for the usual decree of sale.

To this bill appellants filed an answer denying that they were ever indebted to appellee for purchase money of the premises described in the bill. They admit the execution of the notes, but aver that the sum represented thereby was to a large extent made up of usurious and illegal charges for interest, and deny that they in fact owe complainant anything on said notes and mortgage, and deny his right to the decree of foreclosure prayed for. The answer further avers that on December 17, 1895, appellants owed appellee \$2,400, for which they gave appellee a mortgage on the premises described in the bill, and other property, with a chattel mortgage as collateral security; and that, though subsequently and at different times, at the request of appellee, written instruments were entered into between appellants and appellee, they were in fact but a continuation of said original mortgage indebtedness, and were mere schemes and devices on the part of appellee to exact unlawful charges and usurious interest, and that all of said subsequent papers, including the mortgage in suit, were and are tainted with usury. The answer sets out in detail the various transactions between the parties leading to, and terminating in, the mortgage sought to be foreclosed, which we do not deem it necessary to here repeat with particularity.

In addition to the answer, appellants filed a cross-bill, seeking to have the notes and mortgage canceled and surrendered, and for an injunction restraining appellee from assigning or transferring them.

The cause was referred to the master to take and report

proofs, and the evidence, being taken mostly by depositions, was by the master reported to the court. On the hearing a decree was entered in favor of complainant for the full amount due on the notes, for principal and interest, and also for the sum of \$600 as solicitor's fees.

The evidence, briefly stated, shows that appellee originally owned the premises described in the mortgage, and on December 17, 1885, sold and conveyed them to appellant Hannah Newberg, taking back a mortgage for purchase-money, amounting to \$2,400. Appellants being in default in payment, reconveyed the property to appellee April 25, 1889, and the latter gave appellants a contract to convey the property back to them on payment of \$3,200. Being again in default, appellee insisted on a reconveyance of the property to him, and on April 14, 1891, appellants executed to him a quit-claim deed of the premises, and appellee on April 15, 1891, gave them a new contract of sale for the sum of \$4,631.50. Certain letters patent were also assigned by J. P. Newburg as additional security.

On January 20, 1894, appellants being again in default, appellee insisted that they should reconvey the premises to him, and on that date they executed and delivered to him their warranty deed therefor. On October 6, 1894, appellee again deeded the land to Hannah Newburg, and appellants executed to him the mortgage in suit for the sum of \$4,194.73.

It is insisted by appellants that these various conveyances, deeds, mortgages and articles of agreement, were all parts of one and the same transaction, and were but a continuation of the original mortgage indebtedness. We are of the opinion the evidence sustains this contention, and that appellants are not barred from setting up the defense of usury.

We shall not attempt to analyze or discuss the evidence tending to show there was in fact usury taken by appellee and charged in these transactions; suffice it to say we have given all the evidence careful consideration and are of opinion it would warrant the conclusion that appellants'

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contention in that regard is well founded. Under well known rules of law, abundantly sustained by the decisions of our Supreme Court, which need not be cited, if usury has been taken, or is included in the mortgage sought to be foreclosed, and that is a continuation of the original indebtedness, no matter what shifts or devices have been resorted to, the defense may still be availed of, and a court of equity will relieve from its burdens.

We think it was error to allow \$600 for solicitors' fees under the pleadings in the case. The bill only claimed \$200, and alleged that was a reasonable fee. There was no amendment to the bill, and on what principle a complainant is entitled to recover three times the amount he claims in his bill we are at a loss to see. We do not determine the question as to whether or not the fee was reasonable for the services rendered by the solicitors, aside from the allegations of the bill; what we hold is, that, the bill only claiming \$200, it was error to allow a greater sum without amendment.

Other points discussed by counsel in argument we have not deemed it necessary to elaborate upon although they have all been duly considered.

Our conclusion is that the decree must be reversed, and the cause remanded with directions to enter an interlocutory decree referring the cause to a master to state the account. Interest will be allowed on the original debt to the time when usury was first taken, at the contract rate, and after that at six per cent to July 1, 1891, and at five per cent since that date. But as to rents of other lands, if any, which may have been included in the mortgage in suit, interest thereon will be allowed at whatever rate was contracted for between the parties as to such rent. Reversed and remanded, with directions.

**August Nilson et al. v. Home B. & L. Ass'n et al.**

1. **BILL TO REDEEM—*Necessary Averments.***—A bill by a judgment creditor to redeem premises from a foreclosure sale should aver how or in what manner he became a judgment creditor, for what amount, in what court, and show that he is the owner of the equity of redemption.

**Bill to Redeem.**—Appeal from the Circuit Court of Winnebago County; the Hon. RUSSELL P. GOODWIN, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

B. A. KNIGHT and R. REW, attorneys for appellants.

WM. & E. P. LATHROP, attorneys for appellees.

MR. PRESIDING JUDGE CRABTREE delivered the opinion of the court.

This was a bill in equity, filed by appellants, August Nilson and Mathilda Landquist, against the Home Building and Loan Association and Mrs. R. W. Poole, appellees, for the purpose of obtaining a right to redeem certain premises from a foreclosure sale, made in the suit wherein the Building and Loan Association were complainants and Pontus Haegg et al. were defendants. By an amendment to the bill, E. H. Marsh, master in chancery, was made a party defendant, and there was a prayer for an injunction against him. The bill avers that Nilson is a judgment creditor of Mathilda Landquist, but how or in what manner he became a judgment creditor, for what amount, or in what court, whether before a justice of the peace or in a court of record, is nowhere stated or set forth. We think these were material facts, which should have been averred in such terms that the court could see from the bill that his right to have the premises sold to satisfy his judgment existed, if it does exist.

Again, we find nothing in the bill to show that Mrs. Landquist was the owner of the equity of redemption; it is



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nowhere so averred, and it is only by inference or by guessing, that such a fact, if it be a fact, can be ascertained.

The bill was clearly defective in failing to set forth these matters in certain and explicit terms. Mrs. Poole filed a demurrer to the bill, which demurrer was sustained and the bill dismissed for want of equity. We think the bill was clearly demurrable for want of proper and necessary averments. It did not show that either Nilson or Landquist had any right to redeem. Had the bill contained proper averments as to these points, we think it otherwise stated facts which would warrant the interposition of a court of equity; but as it was submitted to the court, we think nothing else could be done except to sustain the demurrer and dismiss the bill. The decree of the Circuit Court will be affirmed.

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**William H. Gruver, Adm'r, v. The City of Dixon.**

1. APPELLATE COURT PRACTICE—*Res Adjudicata*.—The judgment of the Appellate Court, reversing and remanding a cause, is not final and can not be appealed from. It can not be regarded as *res adjudicata* on a second appeal.

2. SAME—*After Three Trials*.—Where a case has been presented to three juries, none of which found against the defendant, it must be a very strong case, to warrant the reversal of a judgment in his favor.

**Action in Case**, for personal injuries. Trial in the Circuit Court of Lee County; the Hon. JOHN D. CRABTREE, Judge, presiding. Verdict and judgment for defendant; appeal by plaintiff. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

BARGE & BARGE, attorney for plaintiff in error.

H. A. BROOKS, attorney for defendant in error.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This is a suit for damages originally brought against the city of Dixon, the defendant in error, by one Thomas C.

Morehouse, for personal injuries alleged to have been sustained by him while walking upon a sidewalk of said city.

The declaration avers that at the time the injuries were sustained, the plaintiff was in the exercise of due care; that the injury was caused by the unsafe condition of the walk, which the city had allowed to become defective, and that the city had actual or constructive notice of such defect. The city filed a plea of general issue. The case has been tried three times; the first trial resulted in a judgment for defendant, which was afterward reversed and remanded by this court. *Morehouse v. City of Dixon*, 39 Ill. App. 107. At the second trial the jury failed to agree. After the second trial the plaintiff died and an administrator was appointed for his estate and substituted as plaintiff. On the third trial there was a verdict and judgment for the defendant. For cause of reversal, plaintiff in error urges that the verdict was against the evidence; that improper evidence was admitted on the part of defendant in error and that the court erred in modifying certain instructions and in giving certain others.

The evidence shows that decedent was a cripple, having a club foot, or a foot slightly turned up at the side, from his youth; that he broke his leg in 1849, and that the same was improperly set and became weak and shriveled; that he walked on the side of his foot, had a boot specially made for him, and used a cane; that at the time of the accident, on the night of June 20, 1884, he was deputy marshal and night watchman, and while patrolling the streets in performance of his duty, he heard a cry, and turning quickly to investigate it, his lame foot slipped between two boards of the sidewalk upon which he was walking, injuring the same so that a year later it had to be amputated. The walk where the injury occurred was in front of a building which was being repaired and had for some time been piled with *debris*, which had, however, been moved that day. Decedent had been in the same employment by the city for more than two years prior to the accident, and was acquainted with this walk and its surroundings. As an officer of the

city he should have known of its condition, and as it was out of repair, reported that fact to the proper authorities.

The question of fact involved in this case has been presented to three juries, none of which found against the city. Under such circumstances the case must be a very strong one to warrant a reversal of the judgment. *Wolbrecht v. Baumgarten*, 26 Ill. 291. Such a case is not presented by the record here, and we are therefore not disposed to disturb the verdict by reason of any question growing out of the facts in the case.

This court, in its opinion filed in this case when it was here before, said, "We have examined the evidence in the case and feel satisfied that the evidence would have sustained a verdict in favor of plaintiff in error." (39 Ill. App. 109.) It is contended that the above expression, used by the court, is *res adjudicata* of the sufficiency of the evidence to entitle plaintiff in error to recover. This contention can not be sustained. The expression used by the court was merely an expression of opinion as to the facts then in the record, and the case was not tried the last time upon the same evidence. The judgment of the Appellate Court, reversing and remanding a cause, is not final and can not be appealed from, and therefore can not be regarded as *res adjudicata* on the second appeal. *Linington v. Strong*, 111 Ill. 152; *Board of Trade v. Nelson*, 162 Ill. 431.

Plaintiff in error urges that the court below erred in admitting in evidence the stenographic report of the testimony of the witnesses Fuller and Clute, given on a former trial of the case. It does not appear that these witnesses could not have been produced, or their depositions taken to be used upon the trial of this case, and it was therefore improper for the court to admit the report in evidence. Their testimony, however, was only as to facts which were substantially admitted by Morehouse himself in his testimony, so that it could not have injured plaintiff in error. It was not, therefore, of sufficient importance to warrant a reversal of the case.

Instruction No. 15, given for defendant in error, is said to

be erroneous because it told the jury that they were not bound to take the testimony of any witness as absolutely true, and should not do so if they were satisfied, from all the evidence and the facts and circumstances proved on the trial, that such witness was mistaken in the matter testified to by him, "or that from any other reason" his testimony was untrue or unreliable. While the instruction may have been inartificially drawn, yet we are satisfied the jury could not have been misled by it, and that they must have understood that they were not to consider any matters as affecting the credibility of the witnesses not arising from the evidence and the facts and circumstances proved on the trial. We have examined carefully the other errors assigned and find nothing affecting substantial justice in the holdings of the court, either upon the evidence or in reference to the instructions.

The judgment of the court below will therefore be affirmed.

Mr. Presiding Justice CRABTREE, having tried the case in the court below, took no part in the trial in this court.

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### Western Stone Co. v. Valentine Musial.

1. MASTER AND SERVANT—*Dangers Incident to the Service*.—Where a servant is injured by dangers incident to the service in which he is engaged—a danger which he voluntarily assumed when he entered into the employment—and where the danger or hazard has not been increased by any fault or negligence of the master, the latter is not liable to the servant for such injury.

2. INSTRUCTIONS—*Negligence—Ordinary Care*.—An instruction which tells the jury that although the defendant might have been guilty of negligence, yet if the plaintiff was also guilty of negligence which helped materially to bring about the accident, the plaintiff could not recover, but gives no definition of either negligence or ordinary care, is erroneous.

**Action in Case, for personal injuries.** Appeal from the Circuit Court of Will County; the Hon. ROBERT W. HILSCHER, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed October 12, 1899.

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AMERICUS B. MELVILLE and HALEY & O'DONNELL, attorneys for appellant.

GIRTEN & CRONIN, E. MEERS and A. M. LASLEY, attorneys for appellee.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was an action on the case, to recover damages for personal injuries sustained by appellee while working in stone quarry No. 6, operated by appellant, on August 22, 1896, near Lamont, Illinois.

The injury was caused by the falling of a bank under which appellee was working at the time of the accident. The quarry in question faced the north, and consisted of an excavation, which ran lengthwise east and west, and terminated at the base of a wall of solid stone ten or twelve feet high, and above that was a bank of clay and gravel sloping upward to a considerable height. From the surface of the ground above there was about twenty feet of clay and dirt before the rock was reached; below that was rock of poor quality, some four or five feet in depth, and from that to the bottom of the quarry was good solid rock. The face of the rock was cut down perpendicularly. The slope of the bank above the rock was in about the proportion of one foot in two. The manner of operating the quarry was to first remove the gravel and clay above the rock, which was called "stripping," so as to leave a sloping face terminating at the top of the rock, and in such condition that it would not be liable to fall down upon the men working below. In entering the quarry the men approached the bank from the north. On the morning of the accident, the employes, including appellee, came in at the usual time and place, and appear to have noticed that in consequence of a rain during the previous night, mud, clay and gravel had been washed down from the bank and fallen upon the bottom of the quarry, so as to interfere with their work. It also appears that before commencing work, the men

looked at the face of the bank, and examined its condition with more than usual care. The foreman and all the employes, including appellee, were experienced quarrymen, and the conditions which existed on that morning in consequence of the rain, were no surprise to them, as the proofs show that rain always caused the slipping of gravel and clay from the face of the bank into the quarry below. The negligence charged in the declaration was a failure to furnish appellee a safe place to work, and a failure to use due care to ascertain the alleged dangerous condition of the bank which fell upon and injured appellee.

There was a trial by jury resulting in a verdict in appellee's favor for \$6,000. The court required a remittitur of \$2,000, which being entered, the court overruled a motion for new trial and entered judgment against appellant for \$4,000, and it prosecutes this appeal.

1. We are of the opinion a clear preponderance of the evidence in the record now before us, shows that the injury to appellee was caused by one of the dangers incident to the service in which he was engaged; a danger which he voluntarily assumed when he entered into the employment of appellant. It is unnecessary to cite authorities to the proposition, that where one is so injured, and where the danger or hazard has not been increased by any fault or negligence of the master, the latter is not liable to the servant for such injury.

2. It is not shown by a preponderance of the evidence that appellant was guilty of the negligence charged in the declaration. On the contrary the greater weight of the evidence is that appellant's foreman, before the accident, caused a proper and careful inspection to be made of the bank, to ascertain its condition as to safety, and there was no want of due care in that respect. It is clear, therefore, that the verdict is not supported by the evidence.

Complaint is made that the court improperly modified one of the instructions asked by appellant. As drawn, the instruction would have told the jury that even if the defendant was guilty of negligence, yet if the jury believed

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from the evidence that the plaintiff was guilty of negligence which helped in any way to bring about the accident which resulted in the injury complained of, they should return a verdict of not guilty. The court modified the instruction by striking out the words "in any way" and inserting in lieu thereof the word "materially," and gave it as thus modified. The jury were thus in effect told that although the defendant might have been guilty of negligence, yet if the plaintiff was also guilty of negligence which helped materially to bring about the accident plaintiff could not recover. It is contended that the instruction, as thus modified, resurrects the obsolete doctrine of comparative negligence. We do not think it open to this construction, although we are not disposed to entirely approve of the instruction, either as asked or as modified and given. True, the plaintiff can not recover unless he was in the exercise of ordinary care for his own safety, at the time of the accident, and it is proper to so inform the jury, giving them at the same time a suitable definition as to what is meant by ordinary care. We regard that as the proper method of submitting the question to the jury. Although the instructions given in the case were numerous, no definition, either of negligence or ordinary care, appears to have been given to the jury, and the instruction under discussion would seem to turn them loose upon a sea of speculation without any guidance to a proper conclusion.

In his closing argument counsel for plaintiff made statements to the jury which were objected to by counsel for the defendant, and the objection was sustained by the court. The statements were improper, and after the court had so ruled, counsel should not have attempted to reiterate them, but so far as the court ruled on the question the ruling was correct, and appellant has no cause of complaint on that score.

For the reasons given, however, the judgment must be reversed and the cause remanded.

**Julia Bordereaux v. William Walker.**

1. **RENTS**—*Pass by Assignment of the Lease*.—The legal title to rents to accrue passes by the assignment of the lease, and the lessor can not be reinvested therewith by a mere oral agreement between him and the assignee, or by a mere redelivery of the manual possession of the lease.

2. **ATTORNMENT**—*Unnecessary Under the Statute*.—An attornment is unnecessary under Section 14 of Chapter 80, R. S., entitled "Landlord and Tenant" (Hurd's Statutes 1899, 1093).

3. **PLEADINGS**—*Payment of Rent to an Assignee*.—In an action for rent by a lessor, a plea of payment of rent by the tenant to the assignee of the lessor, which does not aver that the rent sued for accrued after the assignment of the lease, is bad on demurrer.

4. **LEASE**—*Assignment of the Term Does Not Affect the Reversion*.—Where the assignment of a lease by the lessor is only of the term, the rights of the assignee do not extend beyond the term. The reversion is not assigned, and the assignee has no right to a return of the premises. The right of action for breach of the covenant to return in good condition remains in the owner of the reversion.

**Covenant, for rent.** Appeal from the Circuit Court of Peoria County; the Hon. LESLIE D. PUTERBAUGH, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed October 12, 1899.

**HAMMOND & WYETH**, attorneys for appellant, contended that the demurrer should have been carried back and sustained to the plea, as the plea was not good.

It does not aver that the alleged assignee continued to hold as assignee when suit was brought. *Non constat* that the lease was delivered back or assignment terminated. *Dodd v. Noble*, 5 Blackf. (Ind.) 30.

It does not aver an attornment. It simply alleges that rent was collected by the assignor and paid to him. Attornment is payment with certain knowledge and intention to accept another as landlord. Without attornment, the rights of original lessor are not ended. *Fisher v. Deering*, 60 Ill. 114.

The statute of Landlord and Tenant, Section 14, Chapter 80, R. S., gives an assignee or grantee of lessor certain rights



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of action, without requiring attornment. But this section does not pretend to abolish, nor has it been held that it does away with, the right of action of covenant in the original lessor. It simply adds new rights of action.

Assignee of lessee is liable in debt or assumpsit, but the original lessee is still liable in covenant. Mutuality of contract rights and of actions is the rule. *Murr v. Glover*, 34 Ill. App. 373; *Sexton v. Chicago Storage Co.*, 129 Ill. 318.

The declaration counts also on a breach of covenant to restore the premises in as good condition, etc. The plea disregards this. If this part of the lease is unassignable without the reversion, all is unassignable, and rights are not to be split up. The reversion was not assigned. *Potter v. Gronbeck*, 117 Ill. 404.

The lessor, the owner of the property, is the only one interested in the delivery up of the premises at the end of the term. Assignment of all interest does not affect that right. *Hansen v. Meyers*, 81 Ill. 321.

ARTHUR KEITHLEY, attorney for appellee.

Rent in arrear is a mere chose in action, and not assignable so as to give an action in the name of the assignee; but if not severed, rent to accrue follows the reversion as an incident into hands of the assignee, even to a purchaser at a sheriff's sale; nor will the promise of the lessee to pay the assignor carry any right of action. *Taylor's Landlord and Tenant*, Sec. 447.

Rents in arrear are not assignable, nor is money due for use and occupation. The sale of the fee carries with it rents to fall due, or that may subsequently accrue under any lease, unless reserved, but not rents already accrued. *Kennedy v. Kennedy*, 66 Ill. 190.

The assignee of rent to become due may maintain an action therefor in his own name. *Wineman v. Hughson*, 44 Ill. App. 22.

Where rent has been legally assigned, the assignee may recover it without notice of the assignment to the lessee, unless the rent has been paid to the lessor, in which case

such payment may be shown as matter of defense. *Wine-man v. Hughson*, 44 Ill. App. 22.

The enactment of Sec. 14, Chap. 80, R. S., dispenses with the necessity of an attornment, and abrogates the rule announced in *Fisher v. Deering*, 60 Ill. 114. *Howland v. White*, 48 Ill. App. 237.

MR. JUSTICE DIBELL delivered the opinion of the court.

This case was before us in *Bordereaux v. Walker*, 78 Ill. App. 63. After the cause was re-docketed in the court below, defendant, William Walker, filed an additional plea. Plaintiff filed three replications thereto, and afterward withdrew the first. Said defendant demurred to the second and third replications. The court sustained the demurrer. Plaintiff elected to abide by said second and third replications, and the court entered judgment for defendant in bar of the action and for costs. Plaintiff appeals. James W. Walker was named as co-defendant in the declaration, but no action was taken with reference to him, and we assume he was not served, and that the judgment in favor of William Walker is a final disposition of the case below.

The declaration, which contained but one count, was for rent of a building in arrear upon a lease under seal, and for damages for breach of a covenant therein to yield up the premises at the expiration of the term in as good condition as when received, loss by fire or inevitable accident and ordinary wear excepted. It charged that the rent for certain months was due and unpaid, and that defendant yielded up possession with sash broken, and lights in certain windows in said premises broken and destroyed, of the value of \$10, and that said sash and lights were in good condition when taken by defendant.

The additional plea was in its commencement and conclusion in bar of the whole cause of action stated in the declaration. It sets up that after said lease was executed plaintiff, for a valuable consideration and under her hand and seal, assigned said lease and all the rents to accrue thereon during the term to Lydia Bradley, and delivered said lease so

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assigned to Lydia Bradley, who then and there accepted it from the plaintiff; that by virtue of said assignment said Lydia Bradley became the owner of and continued to own and hold said leasehold estate till after the term mentioned in said lease had expired; and that she collected of the lessees, and they and their assigns and sub-lessees paid to said Lydia Bradley all the rents accruing upon said lease up to the default alleged in the declaration; wherefore the title to said lease and the right of action thereon was and is by such assignment transferred out of the plaintiff and into Lydia Bradley.

The second replication was that after said assignment to Lydia Bradley, and before the commencement of this suit, by agreement between said Lydia Bradley and plaintiff, said assignment was annulled and said writing obligatory re-assigned to plaintiff, "by delivery thereof by said Lydia Bradley to the plaintiff," and that plaintiff thereafter and hitherto possessed the same as her own. The third replication was that at the time of the assignment it was verbally agreed between plaintiff and Lydia Bradley that said assignment was for the security of Lydia Bradley, and for Lydia Bradley to collect the rents under the lease and apply them upon an indebtedness owing by plaintiff to Lydia Bradley; and that before the commencement of this suit Lydia Bradley, by oral agreement with plaintiff, redelivered said lease to plaintiff for plaintiff's own use and as plaintiff's own property, and that Lydia Bradley thence had no interest in said lease.

First. We hold the legal title to rents thereafter to accrue passed to Lydia Bradley by the assignment (R. S., Chap. 80, Sec. 14), and that plaintiff could not be reinvested therewith by mere oral agreement between the lessor and the assignee, or by mere redelivery of the manual possession of the lease to the lessor, or by both.

Second. The plea is not subject to the objection that it does not aver an attornment, for an attornment is unnecessary under our statute above cited. (*Barnes v. Northern Trust Co.*, 169 Ill. 112.) The plea also avers payment of

rent by the tenant to the assignee of the lessor, and such payment is an attornment. (Fisher v. Deering, 60 Ill. 114; Oswald v. Mollett, 29 Ill. App. 449.)

Third. The plea is bad in not averring the rent sued for accrued after the assignment. If it accrued before, it did not pass by the assignment.

Fourth. The plea is bad in not answering the breach of the covenant to return the premises in as good condition as when received, loss by fire or inevitable accident and ordinary wear excepted. As the assignment was only of the term, the rights of the assignee of the lessor did not extend beyond the term. The reversion was not assigned. The assignee of the lessor has no right to a return of the premises. Therefore the right of action for breach of the covenant to return in good condition remained in the lessor, the owner of the reversion. The plea, while professing to answer the whole declaration, does not traverse or confess and avoid the breach alleged, of failure to return in good condition.

For these reasons the demurrer to the replications should have been carried back and sustained to the plea. The judgment is reversed and the cause remanded.

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### William Coffman v. Commissioners of Highways.

1. *APPEALS—To the Circuit Court in Highway Proceedings.*—In a township under township organization an appeal lies to the Circuit Court from the assessment of damages, before a justice of the peace, by a jury called to assess the damages to land owners in a proceeding to lay out a public highway.

*Proceedings to Open a Highway.*—Appeal from the Circuit Court of Knox County; the Hon. JOHN A. GRAY, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed September 26, 1899. Rehearing denied October 10, 1899.

JAMES A. MCKENZIE and PHILIP S. POST, attorneys for appellant.

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Coffman v. Commissioners of Highways.

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CARNEY, SHUMWAY & RICE, attorneys for appellees.

MR. JUSTICE CRABTREE delivered the opinion of the court.

A petition was presented to the appellees to lay out a highway on the line between the two townships of which they were respectively the commissioners of highways. They refused the petition, whereupon one John C. Burkhalter took an appeal to three supervisors, in pursuance of the statute.

The supervisors determined to lay out the road and caused a jury to be impaneled to assess the damages. The road, as laid out, would run for over a mile on appellant's land; the jury allowed him \$246.90, and the supervisors thereupon made an order laying out the road, the justice of the peace having entered judgment for the damages assessed. Being dissatisfied with the verdict of the jury and the judgment of the justice of the peace as to the amount of damages allowed, appellant took an appeal to the Circuit Court, where, on motion of appellees, the appeal was dismissed for want of jurisdiction, and appellant prosecutes this appeal.

As stated by counsel for appellees, the only question involved is whether, in a township under township organization, an appeal lies to the Circuit Court from the assessment of damages before a justice of the peace, by a jury called to fix damages to land owners in a proceeding to lay out a public highway.

Whatever we might otherwise have thought of this question, we feel constrained to follow what is said by the Supreme Court in *Ravatte v. Race*, 152 Ill. 672, in which case it seems to be clearly held that such an appeal will lie. It is true, as contended by counsel for appellee, that the case referred to was *certiorari*, and the question as to the right of appeal was not directly involved, as it is here, but the point seems to have been carefully considered, and the language used in the opinion is certainly strong enough to warrant us in following it, as we do in this case. Many reasons might be given for holding that an appeal ought to

lie in such cases, but in view of what has been said by the Supreme Court in the case referred to, we deem it unnecessary, and are content to hold in accordance with that decision.

The judgment will therefore be reversed and the cause remanded.

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### Board of Education v. John S. Bolton.

1. **BOARDS OF EDUCATION—*Power to Adopt Rules.***—Boards of education have the right to adopt reasonable rules in regard to the admission of children over six years of age, which may operate to prevent such children from entering school immediately after arriving at the age of six years.

2. **SAME—*Rules Must be Reasonable.***—In carrying the law into effect, the board may prescribe rules for the government of the schools and enforce them, but such rules must be reasonable, and calculated to promote the objects of the law in conferring the right of an education upon all children of legal age, free of charge.

3. **SAME—*Right of the Child to be Taught.***—The law confers upon all children of proper age the right to be taught the enumerated branches, and any rule which, by its enforcement, tends to hinder or deprive the child of this right can not be sustained. All the rules must be adapted to the promotion and accomplishment of this great paramount object of the law.

4. **SAME—*What is Not a Reasonable Rule.***—A rule prohibiting children, who have just arrived at school age, from entering the schools at any time except during the first month of the fall and spring terms is not reasonable, or calculated to promote the objects of the law.

5. **PRACTICE—*Where the Reason for Issuing a Mandamus Has Ceased to Exist.***—Courts, in exercising their jurisdiction in mandamus, will not award the peremptory writ where the right sought to be enforced is or has become a mere abstract right, the enforcement of which, by reason of some change of circumstances since the commencement of the suit, can be of no substantial or practical benefit to the petitioner.

**Mandamus.**—Appeal from the Circuit Court of Rock Island County; the Hon. WILLIAM H. GEST, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed October 12, 1899.

C. J. SEARLE, attorney for appellant.

WILLIAM A. MEESE and PETER R. INGELSON, attorneys for appellee.

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MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a proceeding by mandamus, commenced by appellee to compel appellant to admit his daughter, Hazel Bolton, as a pupil, to the public schools of Moline.

The petition, which was filed by appellee on the 15th day of November, 1897, stated he was a resident and tax payer of the school district controlled by appellant; that on the 7th day of September, 1897, he sent his daughter, Hazel Bolton, to a school in said district, where she remained one week, when she was sent home for the reason that she was not of school age; that on the 9th day of October, 1897, said Hazel Bolton arrived at the age of six years, and on Monday, the 11th day of October, 1897, appellee again sent her to said school, but that the superintendent of schools of said district, acting for said board of education, refused to accept her as a pupil, stating that she could not enter the same until on or about April 11, 1898; that appellant's daughter was wrongfully prevented from attending the public free schools of the State, and thereby deprived of the benefits of obtaining an education, as provided by the school laws, to the injury both of appellant and his said daughter.

On March 25, 1898, appellant filed an answer to said petition, admitting substantially all the facts set forth therein, but denying that it wrongfully and illegally prevented said Hazel Bolton from attending said school. It averred, in explanation and defense of its refusal to admit her to said school, that its action was based upon a rule adopted by it for the proper management of the school; that prior to the year 1889 it was the rule and custom of appellant to permit the entry of pupils arriving at the age of six years into the respective schools, in the sub-districts in which they resided, at any time during the school year; that from and after the year 1889 it was the rule and custom to permit the entry of such pupils into said schools only at the commencement of the fall, winter and spring terms, beginning respectively about September 1st, January 1st and April 1st; that the operation of said rule was unsatisfactory and resulted in embarrassing and impeding the progress of cer-

tain classes and subverting the order and system of the school; that afterward, in the year 1893, appellant adopted the rule and custom of only permitting the entry of pupils arriving at school age during the first month of the fall and spring terms, commencing on or about September 1st and April 1st, respectively; that said rule and custom is a just and reasonable one, was duly and legally passed and adopted, and was in force at the time of such refusal to admit appellee's daughter and the commencement of the suit. On March 29, 1898, appellant filed a supplemental answer alleging that the winter term of said school had ended on March 18, 1898, and the spring term commenced March 28, 1898; that on the morning of the latter day appellee's child started in said school and has since continued in attendance thereon.

Appellee filed a general demurrer to appellant's answer and supplemental answer, which the court sustained. Appellant having elected to abide by its answer, judgment was entered in favor of appellee and a peremptory writ of mandamus awarded against appellant.

The only questions presented by the record in this case are:

First, whether, under the law, boards of education have the right, power and authority to adopt reasonable rules and regulations, in regard to the admission of persons over six years of age, which may operate to prevent such persons from entering school immediately after arriving at the age of six years.

Second. Whether, if a board of education has such power and authority, the rules and regulations adopted by appellant, under the conditions and circumstances set forth in its answer, were reasonable.

Third. Whether the trial court had authority to render a judgment in favor of appellee after the abatement of the subject-matter of the suit, as shown by appellant's supplemental answer.

It is provided by paragraph 4, Sec. 10, Art. 6, of our School Law, that boards of education shall have power "to establish schools of different grades and make regulations for the admission of pupils into the same."



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In the case of *The People v. Board of Education*, 26 Ill. App. 476, in speaking of the powers given boards of education by statute, it is said :

“In the exercise of these powers, the rules and orders made by the defendants must not be unreasonable, or such as to defeat the wise and beneficent purposes of the school law, and if reasonable, necessary, and such as will best afford to all the children in their district, entitled to attend public schools, an opportunity to receive the benefits of proper instruction, such reasonable and necessary rules and orders should be sustained by the courts.”

The first question must therefore be answered in the affirmative. Was the provision of the board in reference to the entry of pupils just arriving at school age, into the schools of the district, a reasonable one, keeping in view the provisions of the statute in reference to the admission of children to the free schools ?

The law makes it the duty of the proper board of each district “to establish and keep in operation \* \* \* a sufficient number of free schools for the accommodation of all children in the district over the age of six and under twenty-one years, and shall secure for all such children the right and opportunity to an equal education in such free schools.” Rev. Stat., Chap. 122, Art. 5, Sec. 26, Par. 5.

It was said by our Supreme Court, in the case of *The People ex rel. v. Board of Education*, 127 Ill. 613, that “by the statutes of this State, the duty of providing schools for the education of all children between the ages of six and twenty-one in their district, is imposed,” and in the case of *Potts v. Breen*, 167 Ill. 67, that “the right or privilege of attending the public schools is given by law to every child of proper age in the State.”

In determining whether the rule in question was a reasonable one, under the circumstances, we must inquire whether it was calculated to promote the objects for which free schools were established. In *Rulison v. Post*, 79 Ill. 567, it is said :

“In the performance of their duty in carrying the law into effect, the directors may prescribe proper rules and

regulations for the government of the schools of their district, and enforce them; \* \* \* but all such rules and regulations must be reasonable and calculated to promote the objects of the law—the conferring of such an education upon all, free of charge. The law having conferred upon each child of proper age the right to be taught the enumerated branches, any rule or regulation, which, by its enforcement, would tend to hinder or deprive the child of this right, can not be sustained. All the rules must be adapted to the promotion and accomplishment of this great paramount object of the law.”

Appellant's child was of proper school age, and there was no reason assigned for refusing her admission to the school, save the rule prohibiting children who had just arrived at school age from entering the schools at any time except during the first month of the fall and spring terms. The child had arrived at school age on October 9th, only thirty-one days after the fall term of school commenced, but she was refused admission until March 28, 1898, and thereby lost between five and six months schooling, during that school year; in the meantime the fall term had ended and the winter term had commenced, and also expired.

We are of opinion that the rule which caused appellee's child, who arrived at school age only thirty-one days after the fall term commenced, to lose the benefits of the free school, not only during the remaining months of that term, but also during the whole of the following winter term, was not a reasonable one or calculated to promote the objects of the law. We are also of opinion, however, that the demurrer to the original and supplemental answers should have been overruled, for the reason that at the time of filing the latter, appellee's child had been admitted to the schools under the charge of appellant, and all reason for the issuing of a writ of mandamus had ceased. “It is a well recognized principle that courts, in exercising their jurisdiction in mandamus, will not award the peremptory writ where the right sought to be enforced is or has become a mere abstract right, the enforcement of which by reason of some change of circumstances since the commencement of the suit, can be of no substantial or practical benefit to the peti-

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tioner." Gormley v. Day, 114 Ill. 185; Cristman v. Peck, 90 Ill. 150; The People ex rel., etc., v. Rose, 81 Ill. App. 387. As appellee's child had already been admitted to school at the time the supplemental answer was filed, the object for which the petition was filed had been accomplished, and there then remained no right which could be enforced by a writ of mandamus.

The judgment of the court below will therefore be reversed and the cause remanded.

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**John Funk v. Simon Mohr, Gertrude Mohr, Peter Mohr,  
Franz Mohr and Maria Rinneburger.**

1. *CONTRACTS—Rule of Construction.*—Courts, in construing contracts, will place themselves as nearly as possible in the position occupied by the parties when the contract was made, for the purpose of ascertaining what was meant by what was said.

*Assumpsit*, on a written contract. Appeal from the Circuit Court of La Salle County; the Hon. HARVEY M. TRIMBLE, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

FOWLER BROTHERS, attorneys for appellant.

DUNCAN & DOYLE, attorneys for appellees.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was an action of *assumpsit*, brought by appellees to recover a balance claimed to be due them from appellant, under clause 3 of a certain written contract executed between the parties, dated January 7, 1890. The contract is lengthy, and need not be set out in full, but we shall hereafter refer to such parts thereof as are necessary to a proper understanding of the matters in dispute.

The material facts out of which this controversy arises, so far as the record shows, are substantially as follows:

Prior to 1890 Elizabeth B. F. Reddick had departed this life intestate, in La Salle county, leaving as her heirs at law the appellant, John Funk, who was her brother, and the appellees, who were the children of a deceased half-sister of said Elizabeth, and also one grandchild of said deceased half-sister.

Appellant had obtained possession of all the real and personal estate of said Elizabeth, and certain litigation had been commenced by appellees to establish their claim to one-half of the property. Appellant had commenced a suit against Daniel Evans, who was then the Probate Judge of La Salle county, to recover the sum of \$2,500, which appellant claimed had been obtained from him by Evans on fraudulent claims and pretenses.

For the purpose of procuring a settlement of the litigation between himself and appellees, appellant employed Judge Hiram T. Gilbert, an attorney at law, to go to Germany and endeavor to effect a compromise, giving Gilbert a power of attorney which authorized him to make any agreements in writing which he might deem necessary to adjust differences between the parties, and bring to an end all litigation then pending between them in the courts of La Salle county. Gilbert proceeded to Germany, and, acting under this power of attorney, made a settlement between the parties, the agreement being reduced to writing, and dated January 7, 1890, appellees being the parties of the first part, and appellant the party of the second part. The agreement contained, among others, the following clause:

"Third. That the said party of the second part agrees to pay to said parties of the first part five-twelfths of whatever he may realize out of the suit now pending in the Circuit Court of La Salle County, Illinois, brought by him against Daniel Evans, judge of the Probate Court of said La Salle county, to recover the sum of twenty-five hundred dollars (\$2,500), paid by the said Funk to the said Evans."

After the making of this agreement, the suit of Funk v. Evans was prosecuted to judgment in the Circuit Court of La Salle County, which judgment was affirmed by this court

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(38 Ill. App. 441) and by the Supreme Court. (Evans v. Funk, 151 Ill. 650.)

On February 5, 1895, Gilbert, as Funk's attorney, collected as proceeds of this judgment \$3,146, and applied the same in payment of the amount he claimed was due him from Funk for fees, services and expenses in making the trips to Germany. Funk was notified of this application of the money by Gilbert.

Subsequently one Lynden Evans commenced suit, in the Circuit Court of La Salle County, against appellees, to recover for services alleged to have been rendered by him on behalf of appellees in their litigation against Funk. This suit was defended by Gilbert and D. B. Snow, who were attorneys for appellant, employed by him for that purpose, and paid by him. The result of the suit was a judgment in favor of appellees, which judgment was affirmed by this court and by the Supreme Court. (Evans v. Mohr, 42 Ill. App. 225; 153 Ill. 561.)

Appellant having refused to account to appellees for any portion of the amount collected from Daniel Evans, they brought the present suit against him, and in the court below, where a jury was waived and a trial had by the court, they obtained a judgment for \$1,561.34, being five-twelfths of the \$3,146 collected from Evans, with interest thereon from February 5, 1895, the date when the judgment was collected.

To reverse this judgment appellant prosecutes this appeal.

It was not disputed in the court below, nor is it here, that the sum of \$3,146 was collected as the proceeds of the judgment against Evans, but it is claimed by appellant that clause 3 of the contract above quoted, required him to pay to appellees only five-twelfths of the net amount he might recover from Judge Evans, or, in other words, that he was only bound to pay appellees five-twelfths of the amount collected from Judge Evans after deducting the costs and expenses of collection, including attorney's fees.

He also claims the right of set-off as to moneys paid out by him in defending appellees in the suit brought against them by Lynden Evans.

On the other hand, appellees insist on the right to five-twelfths of the gross amount collected from Judge Evans, and contend that was the true amount "realized," and they deny the right of appellant to any claim of set-off for moneys paid out in the defense of the Lynden Evans suit.

We think it a fair deduction from the evidence, and that it may fairly be inferred from the whole contract (which was procured for appellant's benefit and should be construed most strongly against him), that the \$2,500 paid by appellant to Evans belonged to the estate of Elizabeth B. F. Reddick, in which appellees had an interest, and that appellant had paid it to Judge Evans without right or lawful authority so to do; and that he should recover it back at his own expense seems most consonant with justice and the spirit of the contract. The contract certainly does not limit the right of appellees to five-twelfths of the net amount collected. Had that been the intention of the parties, it was a very simple matter to so express it. Under the definitions given by different lexicographers of the word "realize," either construction claimed by the parties herein might be given to the word as used in the contract, but placing ourselves as nearly as possible in the position they occupied when the contract was made, for the purpose of ascertaining what they meant by what they said, we are disposed to think the parties intended that five-twelfths of the gross amount recovered from Judge Evans should be paid to appellees. This was the construction placed upon the contract by the court below, and we hold it was right.

As to the expenses and attorney's fees in the Lynden Evans suit, although the courts held there was no privity between Evans and appellees, yet it was undoubtedly a matter growing out of the Barnum contract, and within the spirit of the contract made by Judge Gilbert on behalf of appellant with appellees, and which provided that appellees should be protected from any liability which might in any way arise against them, by reason or on account of the Barnum contract. This was the construction placed upon the contract by Judge Gilbert, who drew it and procured

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Ulrich v. Cress.

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its execution for the benefit of appellant. The evidence shows that the contract was so explained by Judge Gilbert to appellant; that the latter adopted such construction and acted accordingly by employing counsel and defending appellees against the Lynden Evans suit. Even if the question as to Judge Gilbert's testimony being competent is properly saved in the record (of which we entertain some doubt), still we are of the opinion it was competent and that there was no error in admitting it. It was not a disclosure of confidential matters, the knowledge of which he obtained while attorney for appellant, but it was a statement of facts in the case concerning which he had personal knowledge. Besides, in the contract under consideration, Judge Gilbert had bound himself personally to the extent of his property, and had a personal interest in the defense of the Lynden Evans suit, and we regard it as entirely competent for him to testify to the construction which was placed upon the contract by himself and appellant in relation to the defense of that suit.

A careful consideration of the whole case satisfies us that the judgment of the Circuit Court was right, and it will be affirmed.

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### Valentine Ulrich v. Sarah Cress et al.

1. *LACHES—When Sufficient as a Defense.*—Where no reason appears, either from the allegations of a bill in chancery or from the evidence, why the complainant should have waited for thirteen years, with a knowledge of the facts, or with a means of knowledge, without taking steps to enforce his alleged rights, the defense of *laches* is sufficient to warrant the dismissal of his bill.

**Bill to Subject Real Estate to the Payment of Debts.**—Trial in the Circuit Court of Peoria County; the Hon. LESLIE D. PUTERBAUGH, Judge, presiding. Decree for defendants; appeal by complainants. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

DAN. F. RAUM, attorney for appellant.

ISAAC M. HORNBACKER, attorney for appellees.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was a bill in equity exhibited by appellant against Sarah Cress, Nellie C. Birge, May C. Campbell and Robert O. Campbell, and also against Charles E. Ulrich, administrator of the estate of John P. Cress, deceased.

After the bill was filed Sarah Cress died intestate, and later, May C. Campbell died intestate, leaving Ralph Campbell her only child and sole devisee, who has been made a party to this suit. Nellie C. Birge and May C. Campbell were daughters of said John P. Cress and Sarah Cress.

The object of the bill was to subject certain real estate, described in the bill, the title to which was in May C. Campbell and Nellie C. Birge, to the payment of a judgment recovered by appellant on February 20, 1883, against said John P. Cress and Sarah Cress, his wife, in the Circuit Court of Peoria County, for the sum of \$1,466.10. John P. Cress died on November 30, 1887. On December 5, 1895, the judgment in question was revived against Sarah Cress, and on December 14, 1895, an execution thereon was issued against her, which was returned "no property found."

On January 20, 1896, administration on the estate of John P. Cress, deceased, was granted to Charles E. Ulrich, and the judgment above mentioned, being presented as a claim against the John P. Cress estate, was allowed March 25, 1896, for the sum of \$2,816.62.

It is alleged in the bill that the real estate described therein, and which it sought to subject to the payment of the judgment above mentioned, was purchased with the proceeds of other real estate formerly owned by John P. Cress and Sarah Cress, and that the conveyances therefor were made to, and the title vested in, Nellie C. Birge and May C. Campbell, daughters of John P. and Sarah Cress, without consideration and in fraud of creditors, and



prayed that it be subjected to the payment of appellant's judgment.

In the view we take of the case we have not deemed it necessary to give the details of the bill, and have therefore only stated enough to show its scope and purpose.

Answers were filed by the various defendants, including May C. Campbell, who was then living, and the cause, being at issue, was referred to the master in chancery to take and report proofs and his findings thereon. Considerable evidence was taken before the master, who reported the same to the court with his findings thereon. The master found, and so reported to the court, that the evidence was insufficient to establish the charges of fraud contained in the bill, in reference to the conveyances of the real estate in question, and that the proofs were not sufficient to entitle the complainant to the relief prayed.

The cause was heard in the Circuit Court on exceptions to the master's report; the court overruled the exceptions and entered a decree dismissing the bill for want of equity, and the complainant prosecutes this appeal.

We think the decree was right. The evidence satisfies us that the findings of the master were justified, and that the court did not err in dismissing the bill. It would serve no useful purpose to discuss the evidence in detail, and we shall not attempt it, further than to say that a portion of the funds for the purchase of the property in controversy, or a part of such property, came from Mrs. Bolender, who paid \$2,400 in cash on the foreclosure of a mortgage on the property owned by John P. Cress and Sarah Cress, and had the title conveyed to herself, and, as we understand the evidence, it was the proceeds of this property which went into the purchase of the real estate in question. The evidence fails to satisfy us that this was not a fair price for the property, nor that she was other than a *bona fide* purchaser. Having become the owner of this earlier property, apparently in good faith, she had the right to do with it as she pleased, and if she allowed the proceeds of it, when sold, to be invested in other real estate for the

benefit of her granddaughters, Nellie C. Birge and May C. Campbell, the creditors of John P. and Sarah Cress had no cause of complaint.

But we are further of the opinion that the defense of *laches*, which was interposed by appellees, was sufficient to warrant the dismissal of the bill. No reason appears, either from the allegations of the bill or from the evidence, why complainant should have waited some thirteen years, with a knowledge of the facts, or, at any rate, with a means of knowledge, without sooner taking steps to enforce his alleged rights against this property, if the conveyances were fraudulent, and without consideration, as he now claims. The principal judgment debtor, as we have seen, died on November 30, 1887, and no steps were taken to have administration granted on his estate until January 20, 1896, a period of more than nine years. The judgment was rendered February 20, 1883, being thirteen years prior to the filing of the bill in this suit—Mrs. Cress and May C. Campbell having died since the bill was filed. Mrs. Bolender has become an old lady, and facts, material to the issues involved herein, may have faded from her mind, which, years ago, perhaps, she could have clearly explained. We think this is a proper case for the application of the maxim that “the laws assist those who are vigilant, not those who sleep upon their rights.” The decree is affirmed.

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### Phenix Insurance Co. v. F. H. Caldwell.

1. **INSURANCE**—*What is Not Transfer of the Property Insured.*—The execution and delivery of a bond for a deed does not constitute a sale within the meaning of a condition in a policy of insurance providing that “if the property be sold or transferred in whole or in part, or if any change takes place in title or possession, whether by legal proceedings, judicial decree or voluntary transfer, assignment or conveyance,” the policy shall be void.

2. **DISCRETION**—*What is Not an Abuse of.*—A court is not guilty of an abuse of discretion in refusing leave to the defendant, at the close of

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the testimony, to amend his pleadings, setting up a new defense to the action, when no showing is made to support it, nor any excuse for not having presented it before.

**Assumpsit**, on a policy of insurance. Trial in the Circuit Court of Rock Island County; the Hon. WILLIAM H. GEST, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1899. Affirmed. Mr. Presiding Justice CRABTREE dissenting. Opinion filed October 12, 1899.

WM. S. JACKSON and A. E. DEMANGE, attorneys for appellant.

HAROLD A. WELD, attorney for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Appellant, on January 3, 1894, issued a policy to appellee insuring his barn on his farm, in the sum of \$2,500, against loss by fire, for five years, and also insuring certain personal property. The barn was destroyed by fire on September 28, 1897. Appellee brought this suit on the policy to recover for said loss. The policy contained the following conditions:

"If the property be sold or transferred (in whole or in part), \* \* \* or any change takes place in title or possession, \* \* \* whether by \* \* \* voluntary transfer, assignment or conveyance; or if the title or possession be changed from any cause whatsoever; or if this policy shall be assigned before a loss, without written notice to and the consent of the company indorsed hereon, this policy shall in each and every instance be void. \* \* \* If the interest of the assured in the property be other than an unconditional, exclusive ownership, and, if it be real property, if it be other than an absolute fee simple title, or if any other person or persons have any interest whatever in the property described, whether it be real estate or personal property; \* \* \* or if there be a mortgage or other incumbrance thereon, \* \* \* whether inquired about or not, it must be so notified to the company, and be so expressed in the written part of this policy, otherwise the policy shall be void. When the property insured (or if it be a building or machinery therein, the land upon which it stands) shall be sold or incumbered, or otherwise disposed of, written notice shall be given to the company of such

sale or incumbrance or disposal, and its assent thereto indorsed thereon, otherwise this insurance on said property shall immediately terminate. \* \* \* Persons sustaining loss or damage by fire, shall, within six days, give notice in writing of said loss to the company, and within thirty days from the date of the fire shall render a particular and specific account of such loss; failing so to do within said thirty days this policy shall become and be null and void."

At the trial the destruction of the barn by fire was proved, and it was stipulated that the value of the barn at the time it was burned was the amount remaining unpaid on the policy. Appellee recovered judgment, and this is an appeal therefrom.

Appellant, by many pleas filed, sought to interpose three defenses: first, failure to present proofs of loss within thirty days, as required by the policy; second, failure to notify appellant of a mortgage resting upon the real estate when the insurance was written; and third, that appellee, after the policy was issued and before the fire, sold the premises, and did not give written notice of the sale to appellant, nor procure its assent thereto to be indorsed upon the policy. Appellee undertook to avoid the first of said defenses by showing oral notice by him to an agent of appellant within six days after the loss, and written notice by said agent to the officers of appellant, followed by language and acts of agents of appellant constituting a waiver of proofs of loss within thirty days. Appellee sought to avoid the defense as to the mortgage by showing that before the policy was issued he notified appellant's agent of said mortgage, and was informed by the agent that it need not be referred to in the policy. The evidence on these two subjects was conflicting. If the jury believed the evidence offered by appellee, these defenses were overcome by him. We are unable to say that the jury erred in their decision of these questions of fact, or that another jury, upon the same evidence, would reach a different conclusion.

The difficulty in the case arises under the defense thirdly above stated. By its second amended plea appellant set up that appellee and his wife, on February 6, 1896, by an instru-

ment in writing under their hands and seals, sold the insured property, and the land on which it stood, to Peter Thuren, his heirs and assigns, for \$13,500, without written notice to appellant and its assent thereto indorsed on said policy; whereby said insurance immediately thereafter terminated. The third amended plea set up the same facts, and further, that on February 28, 1898 (which was after the fire), pursuant to said sale, appellee and his wife executed and delivered to Thuren a deed of said premises in fee simple, whereby said policy immediately terminated. The first replication to said pleas was that the property was not sold before said loss, as charged. Upon this issue was joined. The second replication thereto set up that said instrument mentioned in said pleas was a bond for a deed; that after its execution appellee notified an agent of appellant thereof, and set up language of said agent relied upon as a waiver of further notice, and of an indorsement on the policy; and that in reliance thereon he had paid Thuren the amount of the loss. The third replication to said plea set up notice to said agent of the bond for a deed, and language of said agent relied upon as a waiver. The rejoinders to said second and third replications were to the effect that appellant did not waive the conditions of the policy relative to a sale of the property, and is not estopped, as charged.

In this state of the pleadings upon the subject of a sale of said premises, appellant offered in evidence, at the trial, a bond for a deed, executed February 26, 1896, by appellee and his wife, which recited that they had this day sold to Peter Thuren, his heirs and assigns, for \$13,500, certain land described (being that on which the barn stood); that \$1,200 was to be paid at the ensealing and delivery of that instrument, and a note given for \$3,300, due March 1, 1904, with interest at six per cent per annum, and a note for \$9,000, due March 1, 1911, with like interest; and that upon payment of the first note, deed was to be given and mortgage made to secure the \$9,000 note. By said bond appellee and his wife bound themselves, under a penalty of \$10,000, upon said payments being made, to convey the premises to Thuren

in fee simple by warranty deed. Time was made of the essence of the contract. Appellee objected to the introduction of the bond in evidence. That objection was sustained and appellant excepted. The question then is whether the giving of such a bond or contract, coupled with payment of part of the purchase money, was a sale of the premises, within the meaning of this policy.

The authorities upon this subject are conflicting. Such a contract is held not to be a sale within the meaning of such a provision in a policy of insurance, and the vendor is held to be still the owner, in *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421; *Perry County Ins. Co. v. Stewart*, 19 Pa. St. 45; *Ins. Co. v. Updegraff*, 21 Pa. St. 513; *Hill v. Cumberland Valley Mutual Protection Co.*, 59 Pa. St. 474; *Trumbull v. Portage County Mutual Ins. Co.*, 12 Ohio, 305; *Browning v. Home Ins. Co.*, 71 N. Y. 508; *May on Insurance*, Sec. 267; 1 *Wood on Insurance*, Sec. 331; and in other cases cited in said authorities. The contrary is held in the opinion of the majority of the court in *Davidson v. Hawkeye Ins. Co.*, 71 Iowa, 532, and in *Johannes v. Standard Fire Office*, 70 Wis. 196; *Dupreau v. Hibernia Ins. Co.*, 76 Mich. 615, and *Hamilton v. Dwelling House Ins. Co.*, 98 Mich. 535. The question seems not to have been directly determined in this State. In this conflict of authority we conclude that the determination of the trial court, that the execution and delivery of the bond did not constitute a sale within the meaning of the policy, is most in harmony with analogous principles settled in this State. That the vendor retained the legal title is unquestioned. (*Langlois v. Stewart*, 156 Ill. 609.) But the vendee did not have even the equitable title.

"A mere contract or covenant to convey at a future time, on the purchaser performing certain acts, does not create an equitable title. When the purchaser performs all acts necessary to entitle him to a deed, then and not till then, he has an equitable title and may compel a conveyance. When the purchaser is in a position to compel a conveyance by a bill in chancery, he then holds the equitable title. Before that he only has a contract for a title when he per-

forms his part of the agreement." (Chappell v. McKnight, 108 Ill. 570; Walters v. Walters, 132 Ill. 467.)

The Michigan cases cited *supra* rest upon the contrary principle, that a vendee who has paid part of the purchase money is the equitable owner in fee. As in this State such a vendee has neither legal nor equitable title, the provisions of the policy in suit relative to a change of title were not violated by entering into the bond for a deed. Under the doctrine stated in Hill v. Cumberland Valley Mutual Protection Co., *supra*, appellee will not thereby acquire and keep for his own use both the purchase money and the insurance money, but upon the receipt of the insurance money he will hold it for the benefit of the vendee, who will be entitled to credit therefor upon his contract. This accords with the rule in this State that the vendor is trustee of the title for the benefit of the vendee. (Sutherland v. Goodnow, 108 Ill. 528; Fuller v. Bradley, 160 Ill. 51.) In Stevenson v. Loehr, 57 Ill. 509, after such a contract had been made, part of the land was condemned by a railway company. It was held that if the vendor received the damages he must hold them as trustee for the purchaser, to be accounted for when the purchase money is paid. This principle obviates the main objection upon which the case above cited from 71 Iowa is based. Appellee pleaded, and offered to prove in rebuttal, that he had paid Thuren the full amount of the insurance on the barn. To this the court sustained an objection, and properly, as the bond to Thuren had not been admitted in evidence.

Appellee paid appellant the required premium for this insurance. There is no claim that appellant was in any way injured by the giving of the bond for a deed. It is not claimed that any fraud was practiced upon appellant or that the loss was any other than an honest one. The defense is purely technical. We conclude that, under the rules prevailing in this State, appellee, after he gave the bond for a deed, still held the legal and equitable title, and is entitled to recover.

Although the trial court sustained objections to all direct evidence that Thuren took possession before the fire, that

fact was indirectly proven. That proof, however, does not in this case entitle appellant to avoid the policy under the clause thereof relating to a change of possession, because appellant saw fit not to allege and plead such change of possession as a defense. Clearly it could not avail of such change of possession as a defense without specially pleading it, and giving appellee an opportunity to set up by replication any matter of waiver or otherwise which he might be able to present. The record of the proceedings kept by the clerk shows that on the third day of the trial (and apparently at or about the close of the testimony), appellant asked leave to file an amendment to its second amended additional plea, so as to charge that appellee delivered possession of the premises to Thuren, and the latter thereafter remained in possession, and that the court refused such leave and appellant excepted. The abstract does not show, nor can we find in the record, that this action and exception are preserved in the bill of exceptions. Further, it does not appear that any showing was made in support of the motion. The correctness of the ruling is therefore not presented for decision. Moreover, the evidence (including a letter from appellant's general adjuster) places it beyond dispute that this change of possession was known to the officers of appellant soon after the fire, and there is evidence tending to show its agents knew it before the fire. No reason appears why appellant could not have set up this defense long before. The pleadings were voluminous, and had already been extensively amended by appellant. We are unable to say the court was guilty of an abuse of discretion in refusing the leave at that late stage of the trial, when no showing was made to support it, nor any excuse for not having presented the defense before the trial. (Phenix Ins. Co. v. Stocks, 149 Ill. 319.) It might well be that appellee would have needed to prepare a special replication to such amendment, by way of confession and avoidance, requiring care and time to properly present his answer thereto. The court was not bound to permit that which might result in such delay.

As change of possession was not pleaded as a defense, the



fact that proof thereof incidentally crept in did not call upon appellee to rebut that defense by proof of any kind, nor entitle appellant to the benefit of that proof as a defense, nor to have the jury instructed upon the effect of a change of possession under the provisions of the policy in suit. The instructions appellant offered on that subject were therefore properly refused. If the court ruled correctly in holding that the contract was not a sale, and in refusing to admit it in evidence, then there was no evidence before the jury of a sale of the premises in violation of the terms of the policy, and the court properly refused appellant's instructions upon that subject. The only defenses duly pleaded which there was proof tending to establish were failure to present proofs of loss within thirty days and failure to give notice of a mortgage resting upon the premises when the insurance was written. Upon these subjects the jury were correctly and fully instructed. We find no substantial error in the record.

We have not set out or discussed the provision of the policy that no agent of the company, except its principal officers in New York and its general agent at Chicago, should have power to waive or modify any condition of the policy, etc., for the reason that such provision may itself be waived by the assured and by the language and conduct of its agents having apparent power to bind it (*Phenix Ins. Co. v. Hart*, 149 Ill. 513; *Dwelling House Ins. Co. v. Dowdall*, 159 Ill. 179), and we are of opinion it was waived in this case. The judgment is therefore affirmed.

Mr. Presiding Justice CRABTREE dissenting.

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Geo. Pfeiffer v. H. C. Cressey et al.

1. CHATTEL MORTGAGES—*Acknowledgment of Husband and Wife by Attorney*.—A chattel mortgage by husband and wife, signed by them personally, but acknowledged by their attorney in fact as follows—  
“This mortgage was acknowledged before me by O. M., the duly ap-

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pointed attorney in fact for W. F. R., and F. P. R., his wife, and duly entered by me this 27th of May, 1897,"—fails to comply with the statute providing for the acknowledgment of chattel mortgages, and is not valid as against third persons.

**Appeal**, from the Circuit Court of Peoria County; the Hon. LESLIE D. PUTERBAUGH, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded, with directions. Opinion filed October 12, 1899.

**ARTHUR KEITHLEY**, attorney for appellant.

**RICHARD H. RADLEY** and **J. A. CAMERON**, attorneys for appellees.

**MR. JUSTICE HIGBEE** delivered the opinion of the court.

On August 24, 1896, appellant, by a written lease, rented to A. R. and Mary Mock, his hotel in the city of Peoria, for a period of two years, at a monthly rental of \$150, the rent being evidenced by twenty-four notes of \$150 each, maturing monthly, and secured by chattel mortgage upon the hotel furniture.

This mortgage was acknowledged according to law, and promptly recorded in the office of the recorder of said county. Mock and wife, after some months, sold their lease to others, with the consent of Pfeiffer. After several other changes in the ownership of the lease had taken place, one W. F. Ryon, on May 27, 1897, purchased the lease and the furniture included in the mortgage, with full knowledge, as alleged by appellant, of such mortgage. To make the purchase it was necessary for Ryon to raise \$350 in cash. He applied for the money to a loan agent, who secured for him that amount from R. W. Rutherford and James V. Allen. Ryon and his wife thereupon executed two notes amounting to the sum of \$373, which were made payable to appellee H. C. Cressey, and on the day of their date, or shortly afterward, indorsed by the latter without recourse and delivered to their true owners. At the same time Ryon and wife made a chattel mortgage to

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secure these notes upon all of the personal property in the hotel to appellee Cressey. Ryon having failed to pay the rent notes as they matured, appellant, on August 7, 1897, there being then due \$185 for rent, took possession of the property and advertised the same for sale, according to the terms of the mortgage, on August 16, 1897. On the latter date the sale took place and appellee bought the property himself for \$425. Two days before the time appointed for said sale appellee Cressey filed her bill to foreclose her chattel mortgage and to declare it a prior lien to that of appellant. To this bill appellant and the Ryons were made defendants and filed their respective answers. Some time after the sale of the property said W. F. Ryon filed his cross-bill, in which he admits his indebtedness of \$185 to appellant on the 5th day of August, and that appellant had sold the property under his chattel mortgage for \$425; alleges that the property was worth \$2,000, and prays that appellant may be directed to surrender up to him and to the complainants in the original bill all of the said chattel property, upon being repaid the sum of \$185, and that the notes and mortgage held by appellant be canceled.

Afterward the original bill was amended by making said Allen and Rutherford parties complainant thereto. The case was referred to the master to take the proof of the respective parties and report the same, together with his conclusions thereon, to the court. Objections were filed to the report of the master, which were overruled and exceptions filed to the same in court. Upon a hearing the court decreed that the Cressey mortgage was a first lien upon said property; that the sale of the same by appellant was a fraud upon the rights of complainants in said original and cross-bill, and ordered that the property be surrendered to the master in chancery to be sold; that out of the proceeds of said sale said master should pay first all the costs of suit, except those adjudged against Pfeiffer, and that out of the balance he pay to Allen and Rutherford the sum of \$362.82; that if said goods should sell for more than sufficient to make the payments above mentioned the surplus should be

applied, to the amount of \$185, toward the payment of the costs which were adjudged against said Pfeiffer, and the balance, if any, to said W. F. Ryon. To reverse that decree the appellant, Pfeiffer, brings the case to this court.

It is insisted by appellees that Ryon acquired the property in question without notice of the mortgage to appellant, and was therefore an innocent purchaser, and that as appellant consented to the sale of the property, he thereby waived his lien in favor of Ryon. While there is some controversy in the evidence on the question, the weight of the proof is that Ryon was fully advised as to the existence of the mortgage at the time he made his purchase of the mortgaged property. Such being the case, the first mortgage was valid as between Ryon and appellant. The chattel mortgage given by Ryon and wife to appellee Cressey was signed by them personally, but was acknowledged by Olive Mathis, their attorney in fact. The acknowledgment of the same reads as follows:

"This mortgage was acknowledged before me by Olive Mathis, the duly appointed attorney in fact for W. F. Ryon and Florence P. Ryon, his wife, and duly entered by me this 27th day of May, 1897."

The mortgage does not purport to be acknowledged by Ryon and wife, nor even by Olive Mathis for them, but only by Olive Mathis, who is described as being their duly appointed attorney in fact. We are therefore of opinion that the acknowledgment fails to comply with the statute providing for the acknowledgment of chattel mortgages, and that the mortgage, while good as between Cressey and the Ryons, was not valid as against third persons. *First National Bank of Chicago v. Baker*, 62 Ill. App. 154.

The court below therefore erred in finding that the Cressey mortgage was a prior lien to that of appellant, and in decreeing that appellant pay the costs of suit. As complainants did not move for an injunction or a receiver there is no reason why appellant should not be entitled to rent from the time (August 5th) when he took possession of the premises to the date of the sale, eleven days later, in addition to the \$185 which was already due.

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The decree in this case will therefore be reversed and the cause remanded, with directions to the Circuit Court to enter a decree, providing:

First. That appellant be credited with \$185 rent due him at the date of his seizure of the furniture, and also, in addition thereto, with rent at the same rate from that time to the date of sale, August 16, 1897.

Second. That he be allowed his reasonable and proper expenses of the sale made by him, to be ascertained by the court.

Third. That he be directed to pay the balance to appellees Rutherford and Allen, or to the appellee Cressey for them, to be applied on their mortgage debt.

Fourth. That appellee Ryon pay the costs of his cross-bill and appellees Cressey, Rutherford and Allen all the other costs of suit.

Reversed and remanded, with directions.

Sanitary District of Chicago v. James Ray.

1. CONDEMNATION—*Damages Awarded Not Conclusive as to Further Damages.*—After the condemnation of land for the drainage canal, and the payment of the damages awarded the land owner, the Sanitary District will still be liable for damages resulting from its negligence, either in the construction or operation of its canal.

2. SANITARY DISTRICT—*Its Continuing Duty.*—The Sanitary District is under a continuing duty to obviate defects in the construction of its channel; and when it diverts water from its natural channel to a new one, to so construct the new channel as to carry the water and prevent its overflow to lands which it did not reach before its failure to do so, renders the imperfect construction a continued nuisance for which successive suits can be maintained.

**Action in Case.**—Damages to crops by overflow of water. Appeal from the Circuit Court of Will County; the Hon. ROBERT W. HILSCHER, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

HALEY & O'DONNELL, attorneys for appellant; CHAS. C. GILBERT, of counsel.

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REYNOLDS & PURKHISER, attorneys for appellee.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was an action on the case by appellee against appellant, to recover damages for injury to his crops, grass, hay and pasture, on premises described as the northwest half of the north half of the northwest quarter of section 25, town 37, range 16, in Will county, which he occupied as tenant of his mother, Mrs. Johanna Ray. Mrs. Ray owned a life estate in the land, and her children, including appellee, were the owners of the remainder in fee. The injury complained of was caused by the overflow of the Desplaines river, after the course of the same had been changed by appellant. In 1892 the Sanitary District commenced condemnation proceedings against the owners of the land, Mrs. Ray and her children, including appellee, in which the southeast half of the north half of the northwest quarter of said section 25 was condemned for the purposes and uses of said district. The northwest half, the land now in controversy, was not included in the proceedings, and appellant therefore acquired no rights therein. This land is situated on the northwest side of the Desplaines valley, and at this point the river ran in a crooked and winding course through said valley. The Sanitary District located its main channel on the southeast side of the land condemned and erected a high embankment about the center of its right of way to keep the river out. It also dug a new channel for the purpose of straightening the river on the northwest side of the valley, which new channel was nineteen miles long, and was called the "river diversion." About the time this new channel was finished, in the spring of 1893, appellee, one of the reversioners, rented said northwest half from his mother, for one year. The evidence shows the land was valuable for grazing and meadow purposes. During times of high water, in 1893, the land was flooded, sometimes to the depth of one and one-half feet to two feet, doing serious damage to the grass, hay and pasture.

Appellee again rented the land in the spring of 1894, also in 1895 and 1896, and each year there was an overflow of water from the new river diversion, and appellee suffered like damage in each of the years named as in 1893. Appellee brought this suit to recover such damages. As a defense appellant pleaded the condemnation proceedings, and insisted that the damages claimed by the plaintiff were assessed in those proceedings. There was a trial by jury and appellee had a verdict and judgment for \$320, and appellant prosecutes this appeal.

It is argued and insisted by counsel for appellant in this court, that appellee was not entitled to recover, because:

1. The condemnation proceedings settled the damages and barred any further recovery.

2. That the injury was permanent, and that only one suit could be maintained for the recovery of damages consequent upon the change of the river for the purposes of the Sanitary District.

3. That after the damages suffered during the first year, 1893, appellee must be presumed to have known of the liability to overflow, and rented the land at less than it would be worth but for such liability to damage from overflow.

So far as the first point is concerned, we are of opinion the condemnation proceedings did not settle the damages complained of in this suit. The petition only sought to condemn what is designated as the southeast half of the north half of northwest quarter of section 25 for right of way for the drainage canal, and the adjoining land was not brought into the case, either by cross-petition or otherwise. Even if it should be held that such condemnation proceedings settle the damages to other lands of the same owners, not taken (which we need not now decide), it certainly would only be such damages as arise from a proper construction of the work. Notwithstanding the condemnation of land for a railroad, and the payment of the compensation or damages awarded the land owner, the company will be liable to him or his grantee for damages resulting from its negligence, either in the construction, maintaining or operating its road. (*O. & M. R. R. Co. v. Wachter*, 123 Ill. 440.)

Only damages for unavoidable injury can be anticipated and allowed for in a condemnation proceeding. On the theory and presumption that in changing the course of the river, the new channel would be so constructed as to carry all the water which had formerly passed over the old bed, without overflow, damages for overflow could not reasonably be anticipated. The owners of the land had the right to rely on such theory and presumption, because it was clearly the duty of appellant to so construct the new channel.

The second and third points made by appellant, may be considered together, and we may premise by saying, we think the evidence clearly shows that the construction of the river diversion and the new channel, was imperfectly and negligently performed. It was the duty of the appellant, when it diverted the water from its natural channel to a new one, to so construct the new channel, as to depth, width and capacity, as to carry the water and prevent its overflow to lands which it did not reach before the change was made. From the evidence it appears that a deeper and wider channel would have prevented the injury from overflow. The Sanitary District was under a continuing duty to obviate the defect, and we think its failure to do so rendered the imperfect construction a continuing nuisance for which successive suits could be maintained. Under the circumstances appearing in this case, appellee was not bound to assume that the wall and river diversion would be a permanent construction. (C., B. & Q. R. R. Co. v. Schaffer, 124 Ill. 120.)

Appellee could not maintain suit for permanent damages to the land, and as we hold they were not settled in the condemnation proceedings, he has a right to bring this action for the damages sustained.

It is true there is a want of harmony in the decisions of courts as to cases of this character, upon the question as to whether successive suits may be brought for each new injury and damage, or whether the party is confined to one single recovery. Authorities cited by appellant give the



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one view, and those cited by appellee give the other. After a careful examination of both lines of authorities, we have arrived at the conclusion that the case at bar belongs to that class in which successive suits may be brought for each recurring injury arising from the improper construction and maintenance of the river diversion, which may be regarded as a nuisance. Any other rule would make the first suit a practical condemnation of the land, in a proceeding where the value of the land itself could not be shown. This would certainly not be a fair way to condemn land for a public use.

The statute under which appellant was organized as a Sanitary District specifically provides that it shall be liable for all damages to real estate which shall be overflowed or damaged by reason of the construction, enlargement or use of any channel, ditch, drain, outlet or other improvement, under the provisions of the act. (Sanitary Dist. Act, 19.) We think the case at bar comes within the provisions of this statute. To so hold is clearly just and right. Appellant should either have condemned the property and paid for it, or have so constructed its work as to avoid doing damage to the owners and occupiers thereof.

It is insisted by counsel for appellant that there is no proof of improper construction of the new channel or river diversion. The proof is, however, that land which never overflowed before the change was made, did overflow afterward, and has done so each year since, up to the time this suit was commenced. We think this is a fact from which the jury might well find there was improper construction. Had the new channel been of sufficient capacity to carry the water theretofore flowing in the old river bed, there would have been no more overflow after the diversion than before. On this point we think the jury were not without evidence upon which to base their verdict.

We think there was no error in the action of the court as to the allowance of attorney's fees. (Sanitary Dist. v. Bernstein, 175 Ill. 215.)

Finding no error in the record, the judgment will be affirmed.

**Jacques Bloom v. M. O'Rorke.**

1. VERDICTS—*Conclusive on Questions of Fact.*—The verdict of a jury is conclusive on questions of fact.

Trespass, to personal property. Trial in the Circuit Court of Peoria County, on appeal from a justice of the peace; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

COVEY & COVEY, attorneys for appellant.

F. J. O'BRIEN, attorney for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a suit brought by appellee against appellant, to recover damages for injuries to a horse and wagon of the former, caused by a runaway horse belonging to the latter.

On the day of the accident, July 2, 1898, one Lawrence Beckenhaupt, a boy sixteen years of age, who was in the employ of the firm, of which appellant was a member, to work around its store in Peoria, and deliver goods, was sent out with a horse and wagon to deliver certain packages. He had been told by a man named Davidson, who was at the time working for appellant, that he would pay him to deliver a trunk for him at the depot. Beckenhaupt had gone to the livery stable where the horse was kept and helped hitch up. Soon after he started, he met another boy named Etzenhauser, whom he took in the wagon with him. After delivering one package, he, with the help of the other boy, got the trunk into the wagon and afterward delivered the rest of the packages. He testified that he then started to go back to the store to learn if there were any more packages for him to deliver, but there is some evidence to the effect that he at other times had declared it was his intention to go to the depot to deliver the trunk. On the way to his destination the horse took fright and ran away. Beckenhaupt was thrown out, but

the other boy continued in the wagon and got hold of the reins. The horse was partially brought under control, but could not be stopped, and afterward ran into appellee's horse and wagon, severely injuring the former and breaking the latter.

Appellee's horse was at the time tied to a post by the side of the street, and the horse and wagon were both close to the curb. Appellee paid \$15 for the use of another horse while his was disabled, \$6 for repairs on his wagon and \$15 for the services of a veterinarian. The justice of the peace before whom the suit was commenced gave a judgment for appellant, but on appeal to the Circuit Court, the jury before whom the case was tried gave a verdict for appellee for \$36. A new trial was awarded, and upon a second trial the jury gave a verdict for \$25, for which amount judgment was entered by the court.

It was contended by appellant that the appellee showed no cause of action, and that the court erred in giving certain instructions for the latter. The evidence shows that appellee's horse and wagon were injured, without fault on his part, by the horse of appellant. There was evidence tending to show that at the time the horse started to run away the boy Beckenhaupt was engaged in the business of his employer; that he was not a competent driver, and that the horse was improperly hitched to the wagon; that the horse was hard to hold, was easily frightened, and while he had never run away before, the boy had had trouble with him, and he had run "pretty fast."

While the evidence in the case is somewhat conflicting, it has been passed upon by two juries, who found for the appellee, and we are therefore not disposed to disturb the verdict. All the objections to the instructions are based upon the fact that they were not justified by the evidence in the case.

We are of opinion that there was sufficient evidence to warrant the instructions complained of, and that the court did not err in giving them.

The judgment of the court below will therefore be affirmed.

**Chicago & A. R. R. Co. v. Jane Hardie, Adm'x.**

1. RAILROADS—*Flagman at Crossings—Res Gestae*.—In actions for personal injuries, it is proper to show the exact condition of things at the crossing when the injury occurred, including the fact that no flagman was stationed there; not to establish negligence in not keeping a flagman, but to enable the jury to determine what precautions due care required of the trainmen when backing a train upon the crossing.

**Action in Case.**—Death from negligent act. Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Mr. Justice DIBELL dissenting. Opinion filed October 12, 1899.

GEORGE S. HOUSE and ARTHUR H. SHAY, attorneys for appellant.

H. H. DICUS and McDUGALL & CHAPMAN, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a suit instituted by appellee against appellant and the Streator Railway Company, to recover damages suffered by her by reason of the death of her husband, Thomas Hardie, alleged to have been caused by the negligence of appellant and said Streator Railway Company.

In the summer of 1895, the Streator Railway Company was operating an electric street railway system in Streator, a city of ten to fifteen thousand inhabitants. One of their tracks extended along Hickory street, which runs east and west, and is one of the most traveled streets in the city. The cars running upon said street railway were each operated by one man, who acted both as motorman and conductor. By the rules of the company this motorman was permitted, where the street car track was straight, to go back into the car and collect the fare from the passengers while his car was running, but if the place where the car was then running was at all dangerous he was required to stop his car before proceeding to collect fares.

The rules of the company also required that in approaching a railroad crossing the motorman should bring his car to a full stop, at least twenty feet before the crossing, and should not then proceed until he had ascertained that it was safe for him to cross. The street car tracks crossed the line of three different railroads in the city. At the same time appellant operated a steam railroad passing through the city of Streator. In going through the city, appellant crosses Hickory street with three tracks—a main track, a passing track and a switch track—the main track being north of the other two. Appellant's tracks cross Hickory street at an angle running from the southeast to the northwest, and the main track preserves this same course for some distance on either side of said street. Everett street, running north and south, crosses Hickory street at right angles just west of the point where the former street is crossed by appellant's tracks, so that the railroad tracks pass almost immediately from Hickory street to Everett street. Wason street is the next street west, and parallel to Everett street, and appellant's depot is located on the north side of its main track, about midway between Everett street and Wason street. The depot platform is raised about two feet above the rail of the track, and extends from a point northwest of the depot down the track, in a southeasterly direction to the sidewalk, running north and south on the west side of Everett street.

On the 8th day of July, and for some time prior thereto, appellant ran a regular local freight train, which also carried a car for the accommodation of passengers, from Dwight to Washington, in this State, passing through Streator on each week day. The crew of this train was accustomed, after the arrival of the train, to do what switching work there was to be done at the Streator station. On the morning of said day, this train carried for the accommodation of passengers, an old passenger coach or combination car, the space in front being partitioned off for baggage and express matter and the remainder of the car provided with seats for passengers in the manner of an

ordinary passenger coach. The train arrived at Streator at about 8:40 A. M., where it remained something over two hours, while the train crew was doing the necessary switching. During this time an engine and crew of the C., B. & Q. R. R. Co. switched six coal cars from the tracks of the latter road onto appellant's main track, for the purpose of being delivered by appellant to the Acme coal shaft, situated about half a mile southeast of appellant's depot. When appellant's engine and train crew had finished the switching work, the engine, with two freight cars which had been uncoupled with the engine from the train when it arrived, and were still coupled together, backed upon the main track and were coupled to the six coal cars. The engine and the eight cars attached to it were then backed further down the main track and coupled onto the cars standing there. The train then started to back down the track toward the southeast to the coal shaft, to set out the coal cars. As the train started back, a street car was coming west on Hickory street toward the crossing, on which were one Mallory, the motorman and conductor, and three passengers, one of whom was Thomas Hardie, appellee's intestate. The car was running at its usual speed, and Mallory, the motorman, was in the body of the car, standing with his back toward the railroad crossing, apparently collecting the fares from the passengers. When the street car was discovered approaching, the conductor of appellant's train, and several passengers, endeavored to attract Mallory's attention to his danger by shouting to him, and the conductor also signaled the engineer to stop. The engineer, however, did not bring the train to a stop until the passenger car, or the larger part of it, had run over the street car track. The motorman did not catch the warning given him until his car had reached a point within twenty-five or thirty feet of appellant's track, when he hurried to the front platform of his car and grasped the brake handle and power lever, but was unable to stop the car in time to avoid a collision. By reason of the collision, said Hardie was thrown from the car in which he was riding and received

injuries which shortly afterward resulted in his death. Appellee, having been appointed administratrix of her husband's estate, brought this suit. After all the evidence was in, appellee dismissed her suit as to the Streator Railway Company, and the jury returned a verdict against appellant for the sum of \$5,000, and a motion for a new trial having been overruled, the court entered judgment for the amount of the verdict.

It is claimed by appellant that the verdict in this case was not sustained by the evidence, and the argument of counsel on both sides is mainly directed to that question. That the motorman of the street car company was guilty of the most inexcusable negligence was not questioned on the trial. Appellant, however, insists that it was not guilty of the negligence charged to it in the declaration, and that, even if it were so guilty, such negligence was not the proximate cause of the injury complained of. It can not be questioned that appellant had the right to move its cars up and down the track, across Hickory street, using due care to avoid accident, but appellee claims that the passenger car, with one car attached to it, had been detached from the train soon after its arrival, and left standing immediately north of Hickory street, during the time the switching was being done, and that when the engine and cars attached to it were backed down to couple onto them, the passenger car and the freight car attached to it were "kicked" violently and rapidly back over the crossing, causing the collision. It therefore becomes important to know the condition of the train after it arrived in Streator, up to the time of the collision.

Appellee introduced witnesses Harvey and Donaghue, who testified that they passed the railroad crossing on Hickory street twice that morning and noticed the caboose, or passenger car, standing close to the sidewalk on the north line of Hickory street, the latter witness stating that he thought there was one freight car attached to it; also the witnesses, Fred Schlageter, who was in his office in his planing mill, some 150 feet away, and Philip Schlageter, who was unloading lumber near by, both of whom testified to a similar state of facts.

Witness Harvey also testified that when the engine with the cars attached to it was backed down to make the coupling he heard the cars strike, and saw the brakeman jump off to make the coupling, but that they were going so fast the brakeman could not make the coupling. Fred Schlager also swore that the freight train came down rapidly to make the coupling, and that he "heard them bump together pretty hard." Witness Ritchie testified for appellee that just after the accident, there was one car attached to the caboose, and that soon afterward the train coupled together and pulled away toward the north. On the other hand the conductor, Leighton, testified that in coming into Streator, the train passed over Hickory street and drew up in front of the depot, on the main track next to the depot platform, with the caboose west of the sidewalk running north and south on the west side of Everett street; that the train, as thus stopped, blocked the Wason street crossing, and that to clear this crossing the train was cut between the second and third cars back from the engine; that this being done the engine, with two freight cars attached, moved further on and proceeded to do such switching work as was necessary, leaving the rest of the train standing as above described, and coupled together during all the time the switching was going on; that immediately after the occurrence of the collision, he directed the rear brakeman to cut the train at the crossing.

These statements of the conductor are corroborated by the testimony of Freed, a brakeman, Wilkinson, the engineer, and Reeder, the fireman of the train, and Campbell, the station agent. In addition to the above witnesses, who were all employes, Lawler, the expressman on the train, who was not one of its employes, says that the train stopped near the depot so as to allow the caboose car to just clear the Everett street crossing, and that this brought the caboose car alongside the depot platform, where said car remained coupled to ten or twelve freight cars during the time in question.

Brady, a passenger, testified the caboose car was along



down toward the end of the depot platform. Kern, a passenger, said that the caboose was standing at the southeast end of the platform, just north of the street crossing. Marks, O. W. H. Taylor and Leroy P. Taylor, all passengers, testified that they got into the caboose from the depot platform, and the latter testified that when he entered the caboose it was coupled to the main part of the train.

The overwhelming weight of the testimony, therefore, is that the caboose was left standing by the depot platform west of Everett street, and that during all the time the switching was being done it was coupled to some ten to twelve freight cars standing in front of it. Such being the fact, the caboose and one freight car attached to it could not have been "kicked" back over the crossing, as claimed by appellee. Nearly all the witnesses for appellant above mentioned also testified that when the two sections of the train were coupled together there was no movement of the caboose car.

It also appears from the evidence that when the street car came in sight it was seen by the conductor, and that he immediately signaled his engineer to stop, and shouted to the motorman to warn him of his danger, and that he was joined in the latter by several of the passengers. There is some controversy in the evidence as to whether or not the conductor was on top of the caboose at the time of the accident, but all of the witnesses above mentioned as testifying for appellant, either testified that he was on top of the caboose, or that they heard him calling to the motorman to stop the car, and that from the sound of his voice he appeared to be on the top of the caboose.

On the trial of the cause, counsel for appellee asked several witnesses whether or not, at and prior to the time in question, appellant maintained a flagman at Hickory crossing. These questions were objected to by appellant on the ground that proper foundation for the same had not been laid, but the objections were overruled by the court, and the questions were answered in the negative. The ruling of the court was excepted to by appellant and is now insisted upon as error.

We are of opinion that the ruling of the court in this particular was proper, notwithstanding the fact there was no averment in the declaration of negligence in failing to station a flagman at the street crossing in question, and the further fact that there was no proof of any ordinance of the city requiring such a flagman. In the case of *N. Y., C. & St. L. R. R. Co. v. Luebeck*, 157 Ill. 595, under similar circumstances, an instruction was sustained which had been given for the plaintiff, to the effect that evidence as to whether there was a flagman at the crossing should be considered by the jury, "not as tending of itself to establish negligence, but solely for the purpose of showing the general condition of things at the locality of such crossing at the time of the alleged injury, so as to assist the jury to determine, from all the circumstances and evidence in the case, and under the instructions of the court, whether the defendant was guilty of negligence, as charged by the plaintiff in his declaration." In the course of the opinion it was said, referring to the admission of evidence that there were no gates or flagman at the crossing in question, "under the rule announced in *Chicago & Iowa R. R. Co. v. Lane*, 130 Ill. 116, this was competent in connection with proof of the condition of things in respect to travel and otherwise in that locality, and on the question of the care and caution on the part of appellant in running its train in accord with public safety."

In the case of *McGrath v. N. Y. C. & H. R. R. Co.*, 63 N. Y. 522, it was said :

"The fact (of the presence or absence of a flagman) may be proved as one of the circumstances under which the train was moved, and by which the degree of care requisite in its handling and running may be affected, so that the question never is whether there should have been a flagman, or one ought to have been stationed at the crossing, but whether, in view of his presence or absence, the train was moved with prudence or negligence."

We therefore hold that, in view of the facts proved as to the public use of the street, it was proper to show the exact condition of things at the crossing, including the fact that

no flagman was stationed there, not to establish negligence in not keeping a flagman at that point, but to enable the jury to determine what precautions due care required of the trainmen when backing the train upon the crossing. In our opinion, the questions as to whether appellant was guilty of negligence as charged, and if so, whether its act was the efficient and proximate cause of the injury complained of, were, under the evidence in the case, very close indeed. Under such circumstances, it is very necessary, in order that exact justice should be done, that the jury should try the case, as between plaintiff and defendant, upon its merits, and without prejudice growing out of circumstances connected with other parties.

In the case at bar the deceased, who had started out for a pleasure ride upon a street car, was deprived of his life at a moment's warning without any negligence or fault on his part whatever. The moving agent in the tragedy was the motorman, who, in utter disregard of the rules of his company and of the dictates of common prudence, permitted his car to rush onto a railroad crossing without stopping at a proper distance before the crossing to investigate the possibility of danger, and with his back turned toward the point from which danger must come. Under such circumstances, the jurors would have been less than human if they had not been influenced by a feeling of prejudice against the motorman and his company, and by a feeling of sympathy for the wife of the man whose life had been so needlessly sacrificed.

The street railway company was continued as a defendant in the case until all the evidence had been heard and the case was ready for argument. During the whole trial appellee had had the benefit of such prejudice as may have been engendered in the minds of the jury against the street railway company. It would not be wonderful if, at the conclusion of the proceeding, it had become impossible for the jury to consider the case against appellant entirely free from and unaffected by any prejudice which may have existed among them, against the other defendant.

While we do not intend to express any opinion as to the right of the appellee to recover upon the whole case, yet we are of opinion that appellant, by reason of the facts above stated, did not have such a trial as it was entitled to under the law, and that the case should be submitted to another jury. The judgment in this case will therefore be reversed and the cause remanded for another trial. Reversed and remanded.

MR. JUSTICE DIBELL, dissenting.

There was evidence tending to show that when appellant backed its train into Hickory street the caboose and one or two freight cars attached to it were not coupled to the rest of the train, and were therefore not under the control of the brakemen (who were near the head of the train), nor of the engineer. No employe of appellant was at or near the brakes on said caboose, and one or two freight cars attached to it. If the caboose and one or two freight cars next to it were thus "kicked" into the street and upon the street car track, with no one to control or stop them, then appellant was, in my judgment, liable in this action. There was also testimony tending to show said cars were not thus detached, but had been coupled to the rest of the train before it was backed up. I differ from the majority of the court as to the weight of the testimony upon this subject. Considering the place where each witness was at the time the noise of the collision was heard, his distance from the collision, the quickness with which he got to the wreck, his testimony as to what he then saw as to whether the rear cars were or were not then coupled to the rest of the train, the inability of several of the trainmen to testify positively that the rear cars were uncoupled by the train hands shortly after the collision, and various concessions made by some of the witnesses on cross-examination, I have been brought to the conclusion that the state of the evidence as to whether the rear cars were thus uncoupled when they were driven back upon the street was such that the finding of the jury thereon should not be disturbed.

## Glucose Sugar Refining Co. v. Flinn.

If appellant and the Streator Railway Company were each legally responsible for the death of appellee's intestate, then appellee had the right to sue each, either separately or jointly. If this suit had been originally brought against appellant alone, substantially all the evidence which was introduced at the trial below would have been competent, and must have created just the same feeling toward appellant in the minds of the jury that it did create at the trial now under review, no less and no more. I am unable, therefore, to see how the presence of the Streator Railway Company as a co-defendant till near the close of the trial, could have prejudiced appellant.

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Glucose Sugar Refining Co. v. John L. Flinn.
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1. **VERDICT**—*Settles Questions of Fact.*—The verdict of the jury upon conflicting evidence is conclusive upon questions of fact.

**Assumpsit**, for labor, etc. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

WILLIAM D. BARGE, attorney for appellant.

STEVENS, HORTON & ABBOTT, attorneys for appellee.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was an action of assumpsit by appellee against appellant to recover upon bills rendered for labor furnished and services performed.

The declaration consisted of the consolidated common counts, and one special count, but a demurrer was sustained to the special count and the cause was tried on the common counts and pleas of the general issue and set-off. The jury returned a verdict in appellee's favor for \$7,002.95, upon which judgment was entered after a motion for new trial was overruled, and appellant prosecutes this appeal.

Appellant is a corporation, having various extensive plants in different parts of the country.

Appellee is a contractor, employing large numbers of carpenters, millwrights and mechanics, and his claim against appellant is for the labor and expenses of men furnished to do work in appellant's plants and mills at Rockford and Peoria, Illinois, and at Marshalltown, Iowa, as well as for his own services in estimating the cost of repairs and improvements in various factories belonging to appellant, and estimating value for insurance purposes.

Thomas Gaunt was appellant's general superintendent during the time covered by the bills of appellee. Appellant had succeeded to the rights of the American Glucose Company in the ownership of the plants for which the labor was furnished and the estimates made, and Gaunt was general superintendent of said last named company when it sold out to appellant, in whose services he continued in the same capacity. Appellee, under the direction and employment of Gaunt, had performed similar services for the American Glucose Company to those performed for appellant, under a contract which fixed the compensation to be paid therefor, and appellee's contention is, that his employment by Gaunt, as superintendent of appellant, was at the same rates as those paid him by the American Glucose Company. Appellant, on the contrary, insists there was no such contract, and that the charges of appellee, both for labor and estimates, are unreasonable and excessive.

These were questions of fact for the jury, and we can not say the verdict was not warranted by the evidence. There is no dispute that appellee furnished the men, and that he made the estimates, nor that the rates charged therefor are the same as those paid by the American Glucose Company for similar services.

Appellee furnished bills to appellant, which were marked "O K" by Gaunt; some of them were paid, and no objection appears to have been made to the others until long afterward. It is now contended by appellant that the prices charged were exorbitant, and that Gaunt had no

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Chicago & E. I. R. R. Co. v. Body.

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authority to contract for such rates. These were questions of fact, as we have already said, and we think the evidence warranted the verdict.

There was no error in admitting in evidence the bills for work done in Davenport, under the circumstances in which they went in; nor was there any error in refusing the testimony of Powers as to what Hamlin told him concerning the agreement between appellee and the American Glucose Company. At best it would have been but hearsay evidence and was incompetent.

We find no error in giving or refusing instructions.

The judgment will be affirmed.

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### Chicago and E. I. R. R. Co. v. John I. Body, Adm'r.

1. CONTRIBUTORY NEGLIGENCE—*Children of Tender Years*.—A child of tender years, unlike an older person, can not be expected to know and appreciate the danger of crossing a railroad so as to be guilty of such contributory negligence as to bar a recovery.

2. NEGLIGENCE—*Obstructing Crossings*.—A railroad company is not guilty of negligence in partially obstructing a highway at a crossing for the length of time allowed by law and under the circumstances shown by the evidence in this case.

**Action in Case.**—Death from negligence. Appeal from the Circuit Court of Iroquois County; the Hon. ROBERT W. HILSCHER, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed October 12, 1899.

FREE P. MORRIS and FRANK L. HOOPER, attorneys for appellant; W. H. LYFORD, of counsel.

A. F. GOODYEAR, attorney for appellee; C. H. PAYSON, of counsel.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was an action on the case to recover damages for the death of plaintiff's intestate, Polly Edith Murphy, a

child between six and seven years old, who was run over by one of appellant's freight trains, and thereby killed, at Woodland, a small station on appellant's railroad in Iroquois county, on December 7, 1897. There was a trial by jury and verdict in the appellee's favor for \$2,000, upon which the court entered judgment after overruling a motion for new trial. The defendant brings the case here by appeal.

The declaration contained four counts, but the plaintiff dismissed as to the first count before the case went to the jury. The second count charges negligence in failing to give the statutory signals. The third count alleges that the defendant negligently permitted the view of the railroad south of the crossing to be obstructed by cars standing on the tracks so that the deceased could not "see or hear" an engine approaching from the south until she (deceased) was within four feet of the track; that deceased and the engine reached the crossing at the same time and deceased was struck and killed.

In addition to the charges contained in the two counts mentioned, the fourth count charges that the train which struck and killed deceased was running at a high and dangerous rate of speed, to wit, twenty miles per hour. It is averred in all the counts that deceased was herself in the exercise of due care.

The facts of the case, as we gather them from the evidence, are, that at the time of the accident appellant was operating a double track railroad from Chicago, Illinois, to Terre Haute, Indiana, which ran southerly through Woodland, a small unincorporated village and railroad station. Trains going north on this road used the east track, and those going south used the west track. These main tracks were between eight and nine feet apart. Within a radius of two miles north and south, and one mile east and west, the entire population of the settlement, including the village, was 310 persons. Through the village the tracks ran due north and south, but about three-quarters of a mile south of the station the tracks curve to the east. Fifty feet north of the station there is an east and west highway, generally



called "Main street." The platform of the station, having two steps at the north end, extended to the south line of the highway or Main street. This platform was about 200 feet long and extended some distance south of the station building, which was about forty feet long. About twenty feet south of the station building, west of the platform, there was a small coal-house, about ten feet square and one story high. Immediately west of the coal-house there was a water-closet, and about 200 feet south of the station and upon the same side of the tracks, was a small section-house, and beyond this there appears to have been nothing to obstruct a full view of the tracks as far south as they could be seen. There was a school-house about 500 feet east of the tracks and on the north side of the highway known as Main street. A further description of the premises and surroundings is unnecessary to a fair understanding of the case.

Appellee's intestate lived with her parents about two miles west of Woodland. She belonged in that school district and attended school in Woodland, at the school-house above mentioned, west of the tracks and north of the highway.

At the noon hour, on the 7th day of December, 1897, deceased, in company with eight or nine of her schoolmates, most of whom were older than herself, was looking at Christmas toys in the window in front of Goodyear's store. This was about 100 feet west of the center of appellant's right of way. A regular local freight on appellant's road had just pulled in from the north, and most of the children had noticed its approach. This train was generally late and frequently came into Woodland about noon. It was just stopping, with the caboose or way-car about half way over the track, in the center of Main street, when the five-minute school bell rang. The children at the window, including deceased, at once started for the school-house, which was about 600 feet east of Goodyear's corner and across the railroad track. In going from Goodyear's corner to the railroad some of the children went on the planking which composes the walk across the north and south street,

just west of the right of way, while others walked in the street at the side of it. When they reached appellant's tracks they found the sidewalk on the south side of Main street obstructed by the caboose of the local train and there the children stopped. At this time there was approaching the crossing from the south on appellant's east track, a freight train of forty-two cars. The evidence seems to show that this train was what is known as a "wild train," not running on any schedule time. There is a sharp conflict in the evidence as to the rate of speed at which this north-bound train was running at the time of the accident, and as to whether or not the bell was rung or the whistle sounded for the station or crossing. After the caboose of the south-bound train had partially cleared the crossing at Main street, so there was room for them to do so, the children started to run across to the school-house. Persons who had seen the approach of the north-bound train shouted for them to stop, but, continuing to run, three of the girls and a boy, who were ahead of deceased, got across the tracks safely; the others attempted to follow, but a witness, Mr. Meyer, put out his arms in front of them and tried to stop them. In this he succeeded as to all except deceased, who dodged around him to the north and, apparently with no thought except a desire not to be late for school, ran as rapidly as she could in a northeasterly direction to the north-bound track. Mr. Meyer tried to catch her, but she ran upon the track, was struck by the north-bound train and killed.

The evidence shows that deceased was a bright, intelligent girl, and no doubt she knew and understood the dangers incident to crossing the railroad, as well as one of her tender age and experience could be expected to know and appreciate them. Had she been of mature age there is no question, under the evidence, that she would have been guilty of such contributory negligence for her own safety as to bar her recovery, but we are not prepared to hold a child of such tender years was bound to the same extent as an older person. We need not discuss the different decisions as to how far a child of the age of deceased is to be held

responsible for the exercise of due care. Were that the only question in the case we would not reverse alone on the ground of want of care of deceased. But the question remains whether or not appellant was responsible for the death, for however sad and unfortunate the occurrence, appellant is not to held liable for it unless it was occasioned by its fault or negligence. We have examined the evidence with great care, and we are of the opinion that, giving to the negative testimony such weight as its character entitled it to, appellant was not shown by a preponderance of the evidence to have failed in its duty to give the proper statutory signals, and in that respect the charges of the declaration were not sustained. We also think the evidence fails to show that the train which killed deceased was running at a high and dangerous rate of speed. The evidence on this point was conflicting, but, taken as a whole, we do not think it warranted the jury in finding against appellant on that proposition. A fact worthy of note in this connection is, that the child was killed where she was struck, and was not thrown from the track with any considerable force or momentum, such as would almost inevitably have been the case had the train been running at a high rate of speed.

Nor do we see that the charge of negligence in obstructing the view of the track is sustained by the evidence. We must take a reasonable view of the necessities of railroad operations. To discharge freight and passengers, trains must stop at station platforms, and by the statute, street crossings may be obstructed in the necessary discharge of business for a space of time not exceeding ten minutes. (Rev. Stat., Chap. 114, Sec. 14.) This length of time had not elapsed when the accident occurred, and we are of opinion appellant was not guilty of negligence in partially obstructing the highway for the length of time and under the circumstances shown by the evidence. The other alleged obstructions to the view of the track were only such as appear to be usual and necessary about a railway station, and we can not see that it was negligence on the part of appellant to have been there.

Our conclusion is that the charges of negligence contained in the declaration are not proven by a preponderance of the evidence, and that the verdict was not warranted by the proof. We find no error in the instructions, but for the reasons given, the judgment must be reversed and the cause remanded for a new trial. Judgment reversed and cause remanded.

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**Bauka Kingma v. Chicago & N. W. Ry. Co.**

1. **LIMITATIONS—*Filing Additional Counts.***—When an additional count does not introduce a new cause of action, but is a re-statement, by way of amendment, of the cause of action set up in the original declaration, a plea of the statute of limitations to such additional count is not good.

2. **INSTRUCTIONS—*Negligence a Question of Fact.***—An instruction which tells the jury that if there were several ways over which the plaintiff could have traveled in safety, and he chose to travel upon the track, they should find the defendant not guilty, is erroneous; the question as to whether the defendant was guilty of negligence in walking upon the track was for the jury.

3. **SAME—*Assuming Injured Person to be a Trespasser.***—Whether or not the plaintiff was a trespasser was a question of fact for the jury, and it was erroneous for the court to give instructions to the jury that assumed that he was a trespasser.

4. **NEGLIGENCE—*A Question of Fact for the Jury.***—The question whether a person while walking upon the tracks of a railroad is using due care or is grossly negligent is not a question of law for the court, but one of fact for the jury, under the evidence, environments, and attendant circumstances of the case.

5. **SAME—*Duty to Look and Listen.***—It can not be said as a matter of law that a traveler is bound to look or listen; there may be various modifying circumstances, excusing him from doing so.

**Action in Case, for personal injuries.** Error to the Circuit Court of Henry County; the Hon. JOHN C. GARVER, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed October 12, 1899.

WOODLE & ARNOLD, attorneys for plaintiff in error;  
EDWARD R. WOODLE, of counsel.

JOHN B. LYON, attorney for defendant in error.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was an action on the case brought by plaintiff in error against the defendant in error to recover damages for injuries sustained by him while walking on the railroad track of the latter.

Bauka Kingma, the plaintiff in error, was at the time he received the injuries complained of, a section hand working on defendant in error's railroad under a section boss named Christian DeYoung, whose section extended from a point a mile north, to another two and a half miles south of Waukegan. On the evening of November 6, 1894, at 5:15 p. m., plaintiff in error, in company with said DeYoung and two other section hands, started north on a hand car on said railroad toward the Waukegan depot, from a point about a mile south thereof, making the trip in about four minutes. As he went by the depot, the section boss saw a message in his box for him and got off the car, telling the men to put the car in the section house and he would go and see about the message. At this point defendant in error has two main tracks running north and south, the west one being the track for the north bound trains and the east one for south bound trains. There were several side tracks east of the main track and also what was known as a "spur track" west of the main tracks extending from a point north of the section house to about the place where the accident occurred. The section house was about one thousand feet north of the depot. A passenger train was due that evening from the north at 5:25 and another from the south at 5:27. Defendant in error had a rule that the tracks must be cleared ten minutes before all passenger trains were due and the section boss had informed plaintiff in error of this rule. After the car was housed, plaintiff in error and the two other section hands started back toward the depot, going south on the west, or north bound track. At this time a passenger train came in from the north on the east track and passed them. When within some 700 feet of the depot and just as the passenger

train going south had fairly passed them, the three men were struck by the tender of one of defendant in error's freight engines going south, running backward on the north bound track, to take water at a tank near the depot. Plaintiff in error received severe and permanent injuries, one of his companions was killed and the other one injured to some extent.

The declaration charged negligence on the part of the employes of defendant in error in managing the said engine and in failing "to keep a lookout thereon," in running the engine backward after dark without any light upon the rear of the tender, in running backward in the dark without a headlight, at a high rate of speed, and failure to ring the bell on the engine. The general issue was filed and upon trial a verdict was rendered by the jury in favor of defendant in error.

It is insisted by plaintiff in error that the court erred in refusing to permit him to file an amended count to his declaration during the trial and also in regard to certain instructions refused for plaintiff in error, and given for defendant in error.

At the close of plaintiff's testimony and again at the close of the case, plaintiff in error asked leave to amend his declaration by adding thereto another count. The count offered as an amendment was substantially the same as the other counts, except that it averred that the injury complained of was willfully, recklessly and wantonly inflicted. Defendant objected to the filing of said count, saying: "Our objection is general. It is not the proper time to file it. Further, the statute of limitations has run against bringing any new suit." This objection was sustained by the court and plaintiff excepted. We think the court should have permitted plaintiff in error to file his additional count, but this error would not of itself be sufficient to reverse the case, as plaintiff in error was permitted to introduce evidence of the matters alleged in the amended count under the other counts of the declaration.

In *Blanchard v. L. S. & M. S. Ry. Co.*, 126 Ill. 416, which

was a suit to recover damages for the death of appellant's intestate, through the alleged negligence of appellee, the plaintiff below filed an additional count to his declaration, charging defendant with a wanton and reckless disregard of its duty. To this additional count the defendant pleaded the statute of limitations, to which plaintiff demurred. The trial court, however, held the plea good and overruled the demurrer. The Supreme Court, in the opinion filed in the case, used the following language:

"The trial court erred in overruling the demurrer to the plea of the statute of limitations. The additional count did not introduce a new cause of action, but was a mere re-statement, by way of amendment, of the cause of action set up in the original counts of the declaration. The plea of the statute of limitations to the additional count was not, therefore, a good plea. But this error worked no harm to the appellant, as all the evidence proper to be introduced under the additional count was permitted to be introduced under the other counts."

The tenth instruction given for defendant, told the jury that if there were several ways over which plaintiff in error could have traveled from the section house south in safety, and he chose to walk upon the track, they should find the defendant not guilty; and instruction No. 13 was substantially to the same effect. These instructions were erroneous in that they told the jury as a matter of law that the plaintiff could not recover if he chose to walk upon the track where he received his injury. Whether the defendant was guilty of negligence in walking upon such track, was a question of fact for the jury and not one of law.

In *I. C. R. R. Co. v. Haskins*, 115 Ill. 300, it was held, in an action against the railroad company to recover damages for personal injuries received by the appellee while walking upon the tracks of appellant, that the question whether appellee was using due care or was grossly negligent was not a question of law to be determined by the court, but one of fact to be ascertained by the jury under all the evidence, environments and attendant circumstances.

The eleventh instruction given for defendant, stated, among other things, that it was the duty of the plaintiff to

proceed cautiously and look and listen both ways for the approaching trains or engines. In *C. B. & Q. R. R. Co. v. Gunderson*, 174 Ill. 495, it was held that "it is not proper to tell the jury what acts or omissions will constitute negligence; that it was the duty of the deceased to have looked and listened," etc. In *C. & N. W. R. R. Co. v. Hansen*, 166 Ill. 623, it was said: "It has been repeatedly held that it can not be said as a matter of law that a traveler is bound to look or listen, because there may be various modifying circumstances, excusing him from doing so. \* \* \* It seems to us impossible that there should be a rule of law as to what particular thing a person is bound to do for his protection in the diversity of cases that constantly arise, and the question what a reasonably prudent person would do for his own safety, under like circumstances, must be left to the jury as one of fact." The above instruction, therefore, failed to state the law correctly.

The fourteenth instruction given for defendant, told the jury that if they believed from the evidence in the case that neither the engineer nor fireman in charge of and upon the engine which struck the plaintiff, saw the plaintiff or either of his companions, before the plaintiff was struck by said engine, then the plaintiff could not recover. And the fifteenth and sixteenth instructions told them that the law did not impose any duty whatever upon the freight engineer to discover the plaintiff's presence upon the track, but only required him to exercise ordinary care to prevent injury to the plaintiff, after he discovered the latter and became aware of the dangers to which he was exposed. These instructions assume that the plaintiff was a trespasser upon the track of defendant at the time of the accident and are based upon the theory that a railroad company is not bound to keep a lookout for trespassers walking upon the track. There was a conflict in the evidence as to whether plaintiff was rightfully upon the track in the prosecution of the business of the company, at the time of the accident. Whether or not he was rightfully there was a question of fact for the jury, and it was manifestly errone-



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ous for the court to give instructions to the jury which assumed that he was a trespasser.

Instruction No. 18 given for defendant was as follows :

“ The court instructs you that the rule in evidence about keeping the tracks clear for ten minutes before the arrival of a train, is a rule made for the defendant in the management of its trains, and is not applicable to the case on trial.”

In C. & A. R. R. Co. v. Kelly, 75 Ill. App. 490, where a rule concerning the running of railroad trains was in question, it was said by the court: “ It is insisted that the rule was intended solely for the government of appellant’s employes in the operation of trains and not to influence the conduct of others, and that Kelly had no right to rely upon it. \* \* \* If he knew the rule he had a right to suppose that it would be observed and doubtless his movements in the discharge of his duties in the transfer of mail were influenced by it.” The rule in evidence in this case was no doubt made for the purpose of avoiding just such accidents as the one we are considering. It appears from the evidence that plaintiff in error had been informed of the rule, and he consequently had a right to suppose it would be observed. The statement, therefore, in the instruction, that the rule in question was not applicable to the case on trial, was erroneous.

For the above errors, the judgment in this case will be reversed and the cause remanded for another trial. Reversed and remanded.

**Metropolitan Life Ins. Co. v. Peter J. Larson and Elizabeth Larson.**

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85	143
108	551

1. **INSURANCE—Untrue Statements in Applications.**—Where a person makes true answers to the questions in his application for insurance, the validity of the insurance is not affected by the falsity of the answers inserted by the agent of the company, even though the application contains a stipulation that the agent took it as agent of the insured, and the insurer will be liable notwithstanding the fact that the answers were not true.

2. *SAME—Applications Prepared by Agents of the Company.*—Where an agent of an insurance company visits an applicant for insurance at his home and asks him some formal questions concerning his age, residence and employment, but does not read the application to him, and fills in the answers, such person must be considered as the agent of the company and not of the applicant, and the company will be bound by the statements made by him, notwithstanding the fact that the application was signed by the applicant.

3. *SAME—Validity, When Not Affected by False Answers in the Application.*—False answers in an application for insurance do not necessarily invalidate a contract of insurance unless such answers were known to be false by the applicant at the time they were made, and were willfully made by him for the purpose of defrauding the company.

*Assumpsit*, on a policy of life insurance. Trial in the Circuit Court of Winnebago County; the Hon. CHARLES E. FULLER, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

L. L. MORRISON, attorney for appellant.

The parties to all contracts in writing are supposed to have the intentions which are clearly manifested by the terms thereof. *Richardson v. Maine Ins. Co.*, 46 Me. 394.

When the genuineness of a signature to an instrument is established, it affords *prima facie* evidence that the contents of the instrument were known to the subscriber, and that it is his act, and hence the burden of proof is upon those who assert the contrary, to overcome this *prima facie* evidence. *Ins. Co. v. Gray et al.*, 80 Ill. 28; *Conn. Mut. Life Ins. Co. v. Young*, 77 Ill. App. 440.

If an applicant for life insurance is required to answer questions relating to material facts in writing, and to subscribe his name thereto as part of the application upon which the policy is issued, it is his duty to read the answers before signing them, and it will be presumed that he did read them. *N. Y. Life Ins. Co. v. Fletcher*, 117 U. S. 519.

There is no presumption that an applicant for a policy of insurance was ignorant and misinformed of the contents of the application signed by him. It devolves upon those alleging such ignorance and want of information to make proof of it, but it is not established by the mere fact that

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assured signed a paper, written out by another, when no attempt is made to deceive or mislead him. Insurance Co. v. Gray, 91 Ill. 159.

It is the duty of the insured to know what his contract of insurance is, and, in the absence of any fraud in the making of the same, he must be held to a knowledge of its conditions, as he would be in the case of any other contract or agreement. Cleaver v. Insurance Co., 65 Mich. 527; National Union v. Arnhorst, 74 Ill. App. 482.

A statement in an application for a policy of insurance that the applicant has not consulted, or been prescribed for by a physician, is a warranty, and, if untrue, will avoid the contract of insurance. National Union v. Arnhorst, 74 Ill. App. 482; Life Insurance Co. v. Young, 77 Ill. App. 440; Miles v. Conn. Mut. Life Ins. Co., 3 Gray, 580; Cobb v. Covenant Mut. Ben. Ass'n, 153 Mass. 176; Met. Life Ins. Co. v. McTague, 49 N. J. L. 587.

Where an application is a part of the insurance contract, the assured's answers to the questions put to him are warranties, and must be truthfully made in order that the contract of insurance bind the company. Conn. Mut. Life Ins. Co. v. Young, 77 Ill. App. 440, and cases there cited.

R. K. WELSH, attorney for appellees.

The agent of an insurance company who solicits and takes applications is the agent of the company, and all of his acts are the acts of the company, notwithstanding a provision in the application that the insured makes him his agent or that the application is written by the insured or his own proper agent. O'Farrell v. Metropolitan Life Ins. Co., 22 App. Div. Sup. Court N. Y. 495; 48 N. Y. Supp. 199; Sprague v. Holland Purchase Ins. Co., 69 N. Y. 129; Mowry v. Rosendale, Receiver, 74 N. Y. 360; Union Ins. Co. v. Wilkinson, 13 Wall. 222; American Life Ins. Co. v. Mahone, 21 Wall. 152; Clubb v. American Accident Co. (Ga.), 25 S. E. R. 333; Commercial Ins. Co. v. Ives, 56 Ill. 402; Royal Neighbors of America v. Boman, 177 Ill. 27.

In the case of insurance policies the modern doctrine,

sustained by the great weight of authority, is that where the application is drawn by the company itself, or by its authorized agent, and the statements or the answers to questions contained therein are written by the company, or its agent, in making up the application, and without any fraud or collusion on the part of the applicant, that is, if the application, when signed by the applicant, is the work of the insurance company itself, then in that case the insurer is estopped from controverting the truth of the statements contained in the application in an action upon the contract of insurance between the parties thereto. *Union Ins. Co. v. Wilkinson*, 13 Wall. 222; *American Life Ins. Co. v. Mahone*, 21 Wall. 152; *New Jersey Mutual Life Ins. Co. v. Baker*, 94 U. S. 610; *VanHouten v. Metropolitan Life Ins. Co.* (Mich.), 68 N. W. Rep. 982; *Temmink v. Metropolitan Life Ins. Co.*, 72 Mich. 388; *North American Fire Ins. Co. v. Throop*, 22 Mich. 146; *O'Farrell v. Metropolitan Life Ins. Co.*, 22 App. Div. Sup. Court N. Y. 495; 48 N. Y. Supp. 199; *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274; *Miller v. Phoenix Mut. Life Ins. Co.*, 107 N. Y. 292; *Flynn v. Equitable Life Ins. Co.*, 78 N. Y. 568; *Mowry v. Rosendale, Receiver*, 74 N. Y. 360; *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 129; *McGurk v. Insurance Co.*, 56 Conn. 528; *Clubb v. American Accident Co.* (Ga.), 25 S. E. Rep. 333; *Marston v. Kennebec Mutual Life Ins. Co.* (Me.), 36 Atl. Rep. 389; *Patten v. Insurance Co.*, 40 N. H. 375; *Insurance Co. v. Cusick*, 109 Pa. St. 157.

The doctrine of the foregoing cases is adopted by the courts of this State. *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Phenix Ins. Co. v. Stocks*, 149 Ill. 319; *Royal Neighbors of America v. Bo-man*, 177 Ill. 27.

Under the circumstances surrounding the taking of the application in this case, the law did not cast upon the insured the duty to read the application before he signed it. Neither is the failure on the part of the insured to examine and object to his policy such negligence as will defeat the right of appellees to prove that this application is the work

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of the company. Contracts of insurance may be varied by parol evidence of fraud or mistake, even if loss or death has occurred. Nor does the fact that the application is made a part of the contract and attached to the policy alter this rule. *Kister v. Lebanon Mutual Ins. Co. (Pa.)*, 5 L. R. A. 646; *Marston v. Kennebec Ins. Co., (Mo.)*, 36 Atl. Rep. 389; *Fitchner v. Fidelity Mut. Fire Ass'n (Ia.)*, 72 N. W. Rep. 530; *Slobodisky v. Phoenix Ins. Co. (Neb.)*, 72 N. W. Rep. 483; *Royal Neighbors of America v. Boman*, 177 Ill. 27.

No fraud or wrong was in fact perpetrated upon the insurance company by obtaining this contract of insurance. The applicant did not have consumption when the application was made. The form of consumption which killed him may run its course in from four to six weeks. *Metro-politan Life Ins. Co. v. Mitchell*, 175 Ill. 322; *Tucker v. United Life & Acc. Ins. Ass'n (N. Y.)*, 30 N. E. Rep. 723.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was an action of assumpsit on a policy of insurance, issued by appellant on the life of David R. Larson, a minor son of appellees, payable to them in the event of his death.

The application for the policy of insurance in suit, which was partly printed and partly in writing, was signed by the insured September 10, 1897. He was examined by appellant's local medical examiner September 12, 1897, and received the policy of insurance September 16, 1897. He died of pulmonary consumption December 4, 1897. The application, signed by the insured, contained the following statements, among others :

"I never had any of the following complaints or diseases : \* \* Consumption, disease of lungs." "I am now in sound health; \* \* \* nor have I any physical \* \* \* defect or infirmity of any kind." "I have not been under the care of any physician within two years." "No one of my parents or grandparents, brothers or sisters, ever had any consumption or any pulmonary or scrofulous disease."

Under the above statements in the application there was also the following :

"And I further declare, warrant and agree, that the rep-

resentations and answers made above are strictly correct and wholly true; that they shall form the basis and become part of the contract of insurance if one be issued, and that any untrue answers will render the policy null and void; and that said contract shall not be binding upon the company unless upon its date and delivery the insured be alive and in sound health."

The policy included as a part of it, a copy of said application. The declaration contained special counts setting up the policy. The general issue and three special pleas were interposed by appellant. The special pleas denied the right of appellees to recover by reason of the breach, by said David R. Larson, of the above warranties contained in the application and policy. Appellees replied "that David R. Larson did not make the statements and answers, or either of them, as set forth and charged in said pleas." There was a trial by jury and a verdict for plaintiffs for \$526.25, and also several special findings by the jury. A motion for new trial was overruled and judgment rendered on the verdict.

The main contention of appellant in defense of the action is, that the statements of the insured, in his application as above set forth, were false, and that being made warranties they rendered the policies void. On the other hand appellees insist that the statements in the application were in fine print, were never read over to the insured and were not made by him, but were in fact the statements of the agent who took the application, and that appellant is estopped from denying their truth. There is no proof, aside from the fact that the insured signed the application, that he knew its contents. The only witness who testified on this point was his mother, one of the appellees, who swore that the agent did not read the application over to David or tell him what was in it, and the latter did not read it; that the agent asked him where his home was, where he was born, how old he was, what he worked at, where he worked and how long he had worked there; that no other questions whatever were asked of the insured by the agent.

It appeared from the evidence, however, that on August

24, 1897, the insured had called upon a physician, who prescribed for him and told him he had trouble with his lungs, but did not tell him the nature of the trouble. The physician testified that the prescription was for an inflammatory condition of the lungs, which was probably tubercular, and that he told David that he wished to talk to his parents about it. That he did not see David any more, and did not see his mother until October 1, 1897, after the insurance had been issued, when she paid him for the prescription; that so far as he knew, neither David nor his parents knew that he had pulmonary tuberculosis until October 1, 1897, when he told the mother that such was probably the case.

Under all the circumstances, we are not prepared to say that the statement of the insured, even if it should be considered his statement, that he had not been under the care of a physician for two years, was untrue. He had indeed received a prescription from a physician for a cold, which perhaps to some extent involved his lungs, but it can hardly be said that he was under the care of a physician in the ordinary sense of that term, and the jury specially found that he was not under such care.

There is no evidence in the record showing that David was not in sound health at the time he made his application for insurance. The physician who had previously prescribed for him testified that at the time he last saw David he appeared, so far as external indications are concerned, to be ruddy and in sound health. Appellant's local medical examiner, who examined him on September 12, 1897, reported that he had made a physical examination of the lungs of the "life proposed," and found no indications of disease; and also that he was of opinion "said life" was in good health. It is true that death from pulmonary tuberculosis, or quick consumption, followed within three months after the application for insurance. It appears from the testimony of the physician who had prescribed for David, that there is a form of pulmonary tuberculosis or consumption which may run its course in from two to four weeks, and the same physician testified that "such a thing could be pos-

sible, that he (David) could have been in sound health on the 12th day of September, 1897."

In the case of *The Metropolitan Life Ins. Co. v. Mitchell*, 175 Ill. 322, which was similar to the present case, in some respects, it is said :

"The assured took out the policy March 18, 1894, and died of consumption March 31, 1895. The defense interposed was, that to secure the insurance he had made false statements as to his former condition, especially as to not having consumption or bronchitis, and as to not having consulted a physician. The company offered evidence to show by a physician who treated deceased January 8, 1895, a little over two months before his death, that he had consumption, and that the disease, in his opinion, had existed for at least eighteen months. On the other hand, a physician of large experience testified that a person may contract the disease of consumption and die of it in six weeks. \* \* \* In view of the nature and character of the evidence offered, in support of the good faith and truthfulness of the representations in the application, as well as in view of the common knowledge that the disease sometimes runs its course rapidly, the judgment is believed to be fully sustained."

It also appeared from the evidence that a sister of the insured had died in 1890, and that the physician in charge, who was a witness in this case, ascribed the cause of her death to pulmonary tuberculosis. The witness, however, testified that the sister also had tubercular ulceration of the hip, and that the pulmonary disease was secondary to the hip disease; that the germs were taken from the hip and deposited in the lungs, and that was "what caused the mischief."

The insured was only about ten years of age at the time the death of his sister occurred, and the evidence failed to satisfy us that he knew that she died of consumption. The proof upon the whole does not show that the insured knowingly made any false statement to the agent of the company for the purpose of obtaining the insurance, and thereby perpetrate a fraud upon appellant.

Appellant contends, however, that it was the duty of the applicant to read the application signed by him, and that having failed to do so, the beneficiaries are bound by the



answers therein contained. In support of this view, the case of New York Life Insurance Co. v. Fletcher, 117 U. S. 519, is cited. The rule laid down in that case, however, is expressly repudiated by the Supreme Court of our State in the case of Royal Neighbors of America v. Boman, 177 Ill. 29, where it is said that "whether the beneficiaries should be estopped from questioning the truth of the answers contained in the application, also depends upon the peculiar facts of each case, and the relation of the parties."

In the case under consideration the applicant was a boy, only seventeen years of age, who worked in a butcher shop, and was presumably not possessed of such business knowledge as would lead him to scrutinize carefully, or to fully understand the import of the application signed by him. In such case the question arises as to whether the agent who took the application was really the agent of the insured or of appellant.

In the case of Royal Neighbors of America v. Boman, *supra*, it was said:

"It is notorious that the contracts of insurance are, on the part of the insured, entered into without the advice of counsel, and chiefly upon the representations of the agents of the insurer. Such agent is justly looked upon as the accredited agent of the company, in whom it has confidence, and holds out as worthy of the confidence of its patrons. \* \* \* Where one makes true answers to the questions in an application for insurance, the validity of the insurance is not affected by the falsity of the answers inserted by the agent of the company, even though the application contained a stipulation that the agent took the application as the agent of the insured."

And in that case the company was held liable, notwithstanding the fact that the answer inserted by the agent to a certain question was not true. See also Insurance Co. v. Wilkinson, 13 Wall. (U. S.) 222.

In this case the insured appears to have been solicited to take out a policy by the agent of the company, who visited him at his home and spent several hours with him. Even at the end of that time the insured hesitated and would not consent to sign the application until he had asked his mother

whether he should insure or not. She told him to do as he pleased, and he then consented to make the application. The agent only asked him some formal questions concerning his age, residence and employment, and the answers were filled in by the agent himself. The application was not read to the applicant, and he does not appear to have had any information concerning its contents.

Under all the circumstances of the case, the agent who took the application must be considered as the agent of the company and not of the insured, and, as the application was made out by the agent, the company must be bound by the statements made by him, notwithstanding the fact that the same was signed by the applicant.

We think the verdict of the jury was warranted by the evidence, and that the judgment should be affirmed. Judgment affirmed.

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### James Dinsmoor v. Abram Wolber.

1. **MASTER AND SERVANT—*Liability for the Acts of the Servant.***—The master of a servant is chargeable with the injurious consequences of the servant's acts, done while in the service of the master, and within the scope of his employment and authority.

2. **SAME—*Master's Liability.***—If a servant, driving his master's wagon along the highway, carelessly runs against the carriage of another person and injures him, the person injured has a right to treat the wrongful act as the act of the master.

3. **SAME—*Liability for Acts Willful or Only Careless.***—Where the master sets the servant to work about his own business, with the right to direct and control him as to the manner of doing it, he ought to answer to others for whatever injury was suffered by reason of what his servant does, or of the manner in which he does it; and equally so whether it be willful or only careless or unskillful.

4. **SAME—*Exemplary Damages.***—Whenever exemplary damages are recoverable if the act is done by the master himself, they are equally recoverable when the act is done by his servant.

**Action in Case, for personal injuries.** Appeal from the Circuit Court of Whiteside County; the Hon. FRANK D. RAMSAY, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed October 12, 1899.

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JARVIS DINSMOOR, attorney for appellant.

J. E. MCPHERRAN, attorney for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was an action on the case, by appellant against appellee, brought to recover damages for injuries to himself and property and loss of services of his wife, resulting from the alleged negligence of a servant of appellee.

The declaration contained three counts. The first charged that while appellant and his wife, on April 28, 1897, were riding along a certain public highway, a servant of appellee, driving a team of the latter, so carelessly and negligently drove said team that the same, and the tongue of the wagon to which they were attached, struck the carriage and horse of appellant, crushing the carriage, injuring the horse and throwing appellant to the ground, whereby he was damaged, etc. The second count charged that by reason of said alleged negligence on the part of the servant of appellee, plaintiff became sick and was prevented from attending to his business, was deprived of the services of his wife for a long space of time, was obliged to pay out money for her care and nursing and for extra servants, and also for the repair of his carriage, etc. The third count charged that the injury was caused by the willful, wanton, malicious and careless conduct of the defendant. To this declaration the general issue was filed, and upon the trial the jury found a verdict for appellee, and judgment was entered against appellant for costs. Appellant complains that the verdict is against the weight of the evidence; that the court excluded proper evidence and improperly instructed the jury.

It appears from the evidence that, at the time appellant received the injury complained of, he was driving along at a rapid trot in a covered buggy, going from Sterling toward his home, some two and a half miles distant. It was raining a little and the top of the buggy was up and the side curtains on. He was driving in the middle of the road,

which at that place was comparatively level and some sixty-seven feet wide, when he was run into by a team belonging to defendant and driven by one Matthias Appenzeller, his servant. Appellant and his wife were thrown forward upon the ground, receiving severe injuries, and the buggy was badly broken. He testified that his horse ran away and was so badly frightened as to be ruined for use as a family horse thereafter. Appellee was a farmer, living some seven or eight miles north of Sterling, and on the day in question he and his said servant had been to that place to deliver two wagon loads of stock. Appellee drove home with one of the teams a short time after the stock was delivered, directing Appenzeller, as he says, to come home, as he had lots of work for him. The latter, however, remained until about six o'clock p. m. before starting back. That the injuries complained of were caused, at the time alleged, by the negligence or willfulness of Appenzeller, the servant of appellee, is not denied. Appellee, however, knew nothing concerning the matter until some time after it occurred, and insists that, under the circumstances of the case, he is not liable for the acts of his said servant.

In Reeve's Domestic Relations, at page 358, the law upon this question is thus stated :

"This subject may be illustrated by the following case: A, the servant of B, is employed by him to drive his wagon. A, whilst driving his wagon, leaves it in the road and commits a battery upon C. B would not be liable. But if A had continued driving the wagon and drove with violence over C, with design to injure C, B would have been liable. In the first place, A had abandoned his master's business; in the latter case he was in the immediate pursuit of it, though done in such a manner as to injure another person; or, in other words, in the first place he was not driving his master's wagon, which he was employed to do; in the last he was.'

Wood, in his work on Master and Servant, Section 280, states the rule as follows :

"If a servant driving his master's carriage along the highway, carelessly runs over a bystander, \* \* \* the person injured has a right to treat the wrongful act as the act of the master; *qui facit per alium, facit per se*. If the master

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himself had driven his carriage improperly \* \* \* he would have been directly responsible, and the law does not permit him to escape liability because the act complained of was not done by his own hand."

In *Chicago City Railway Co. v. McMahon*, 103 Ill. 485, it is said :

"Few actions would be maintainable if a recovery could be had only in cases where express authority is given or the agent is required to commit the wrong. It is a general rule, without exception, that when a servant exercises his power or performs his duty in so careless or negligent a manner that wrong ensues to another, the master is liable in damages."

In the case of *Christian v. Irwin*, 125 Ill. 619, where the plaintiff and another man were riding in a buggy along a street in Chicago, and at the intersection of another street, and while they were observing due care for their personal safety, were run into by the horse and wagon of defendant, then being driven by his servant, by which plaintiff sustained severe injuries, it was held that the master was liable for the misconduct of his servant.

It is contended by appellee that in this case the injury complained of was caused by the willful misconduct of the servant, outside of the line of his employment, and that therefore there should be no recovery. We do not think this position, however, is sustained by the authorities.

In *Arasmith v. Temple*, 11 Ill. App. 39, it is said, in speaking of the liability of the master for the acts of his servant, "having set the servant to work about his own business, with the right to direct and control him as to the manner of doing it, he ought to answer to others for whatever injury was suffered by reason of what he so does, or of the manner in which he does it; and equally so whether it be willful or only careless or unskillful."

To the same effect is the case of *T. W. & W. R. R. Co. v. Harmon*, 47 Ill. 298.

There is no controversy as to the main facts in the case. On the occasion in question the servant was driving home from market, whither he had gone in company with his

master at an earlier hour, along the road usually traveled from such market to the home of his master, driving the latter's team, and, in that regard, doing the very thing for which his master had employed him, and while so engaged, he carelessly or willfully caused the injury complained of. Under such circumstances we think appellee was liable for the wrongful act of his servant, and that the jury should have found for the appellant.

Under the third count of the declaration proof was introduced tending to show that appellee's servant willfully, wantonly and maliciously ran into appellant, thereby inflicting the injuries complained of. The trial court refused appellant's twelfth instruction, which stated that if the jury found appellee guilty, and that the injury complained of was inflicted by the gross, willful and wanton recklessness of the latter's servant, they were at liberty to give exemplary damages against appellee; and gave appellee's third instruction, which advised the jury that exemplary damages could not be recovered.

Wood's Master and Servant, Section 323, in discussing this subject, says :

"It may be regarded as settled by the better class of cases that, whenever exemplary damages would be recoverable if the act had been done by the master himself, they were equally recoverable when the act was done by his servant."

The authorities are not harmonious in regard to this question, but we are of opinion Illinois has substantially adopted the rule above quoted.

In *I. C. R. R. Co. v. Hammer*, 72 Ill. 347, which was a suit for injuries alleged to have been caused by servants of defendant, and charged in the declaration to have been wanton and malicious, the trial court had instructed the jury that for gross negligence of appellant they would be at liberty to give punitive damages. This was held to be incorrect, but it was said :

"If its servants, while in the employment of the company, engaged in carrying on the business of the company, should willfully or wantonly produce injury to others, then the

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company would, no doubt, be liable to such damage. With its servants, a mere omission of duty, although grossly negligent, should not be sufficient, but some intention to inflict the injury, or a reckless, wanton disregard for the safety of others, should appear to warrant punitive damages." See also *T. & W. R. R. Co. v. Harmon*, *supra*; *I. & St. L. R. R. & C. Co. v. Cobb*, 68 Ill. 53; *West Chicago St. R. R. Co. v. Morrison, Adams & Allen Co.*, 160 Ill. 288.

It is true that the above cases all involved actions against railroad corporations for injuries alleged to have been caused by their servants, but the rule adopted appears to apply with equal force to cases involving the liability of natural persons under like circumstances. The case of *Hawes v. Knowles*, 114 Mass. 518, was very much like the one at bar. The plaintiff offered evidence to show that the servant of the defendant (a natural person), who was driving defendant's stage coach at the time of the collision, drove against the wagon of the plaintiff, wantonly as well as carelessly and negligently. The trial court held that if there was wantonness or mischief in the act of the servant, affecting the plaintiff injuriously in body or mind, that fact would tend to enhance the damages, and this ruling was sustained by the Supreme Court.

We are, therefore, of the opinion the court should have given the instruction asked for by appellant, and refused the one given for appellee upon the above subject.

Upon the trial appellant offered to show that Appenzeller had been seen upon the highway before the time in question in an intoxicated condition, and that the person who saw him told appellee that the servant was "awful drunk, and did not know anything about driving a horse." This evidence was excluded and an exception was taken. There was no charge in the declaration that appellee had employed an incompetent servant, and consequently no error in excluding the testimony.

For the reasons above stated, however, the judgment will be reversed and the cause remanded.

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**Jacob P. Schnellbacher and Henry Schnellbacher v.  
The Frank McLoughlin Plumbing Co.**

1. EVIDENCE—*Statements of Account—When Not Proper.*—Statements of account appearing to be purely an afterthought and made up simply for use upon the trial, not coming within any rule of evidence permitting the use of memoranda by witnesses, are not admissible as evidence.

**Assumpsit**, on a contract for plumbing. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed October 12, 1899.

JACK & TICHENOR, attorneys for appellants.

DAN R. SHEEN and A. KREISMAN, attorneys for appellee.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

Appellee brought suit against appellants to recover a balance alleged to be due it for plumbing, gas and steam-fitting in remodeling a hotel in Peoria. There was a trial by jury, and a verdict in favor of appellee for \$1,200, upon which judgment was entered, and the defendants appealed to this court.

There is a sharp conflict in the evidence as to the terms upon which the work was performed and materials furnished. The contention of appellants is that appellee contracted to do the work, and furnish the materials for the necessary plumbing work, in remodeling the hotel, for the sum of \$3,175, less an allowance or deduction therefrom for old material in the building, which could be used again; the amount of such deduction to be determined as the work progressed. Also that there was to be a further reduction on account of cheaper fixtures being used than those bid upon, it being claimed by appellants that such deduction or difference in the cost of fixtures was agreed upon between the parties soon after the contract was let to appellee.



On the other hand, appellee insists that it did the work and furnished the materials under a *quantum meruit*. It also claims to have made various changes and alterations in the work differing from the original plan, and that these changes were made under the direction of Jobst, a contractor who did the carpenter work; that under the arrangements between appellants and Jobst, the latter was superintendent of the building, and that his orders were binding upon appellants. But appellants contend that Reeves, the architect, was the superintendent of the building, and the only one whose orders were binding upon them.

These were all questions of fact for the jury, and as the case must be remanded for a new trial, for the reasons hereafter given, we forbear expressing any opinion at this time upon the evidence relating thereto. It appears from the evidence that appellants have paid appellee the sum of \$3,940.34, and, it would seem, are entitled to some credits for old materials used and for cheaper fixtures furnished. Whether anything is still due appellee is a question to be determined by the jury upon a proper trial of the case.

Thomas F. McQuellon was sworn as a witness on the part of the plaintiff, upon the trial of the case, and testified concerning his estimate of the labor and materials put into the building by appellee. The witness had prepared this estimate before coming upon the stand, and it consisted of a lengthy and detailed statement covering many pages. This statement was made up partly from the witness' own knowledge, partly from what he found in various memoranda in possession of appellee, and partly from what he was told by workmen of appellee, who were not produced as witnesses in the cause. It was made up long after the work was done, and after this controversy had arisen. It was not made by McQuellon as a part of his duty while working for appellee, during the remodeling of the building, nor as a memorandum of any business transaction proper to be kept at the time.

The statement appears to be purely an afterthought, made

up simply for use upon the trial. It did not come within any rule of evidence permitting the use of memoranda by a witness, yet, not only was the witness permitted to refer to it while testifying, but the paper or statement itself was admitted in evidence over the objection of appellants. This we think was manifest error. The witness should have been required to state on the stand such material facts as were within his own knowledge. To allow this paper statement to go into the evidence was extremely unfair to the opposite party, who could not be expected to meet and rebut a case thus sworn to *en masse* or in bulk, especially when the statement is not made up from original documents or books of account, but has been subsequently prepared from many sources, some of which were clearly hearsay and incompetent. Again, appellee, over the objection of appellants, was permitted to put in evidence many bills for materials it had purchased from various dealers, upon the lump statement made by a witness that much of such material went into the hotel; that he could not tell what items, or how much they amounted to, but that at least nine-tenths of the items went into the building. We think it clear that these bills should not have been admitted in evidence. In other cases the witness erased from the body of similar bills items which he testified did not go into the hotel, and upon his testifying that the rest of the items in the bill did go into the house, the whole paper upon which the bill was written, with no figures or totals erased, went to the jury over appellant's objection. In this manner large totals were gotten before the jury, which totals included many items which it was conceded did not go into the hotel, and appellants were left to the chance that the jury would or would not make the proper deductions from the totals. We think this was improper and eminently unfair to appellants. It would probably have been proper to permit the witness to refer, while testifying, and for the purpose of refreshing his recollection, to bills containing items which did not go into the building, as well as those which did, but we are of opinion such bills could not properly go to the jury, con-

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taining, as they did, items used elsewhere and not in the work done for appellants.

The court erred in refusing the second instruction asked by appellants, but as the jury found a verdict against them for \$1,200, such refusal did them no harm.

Instruction number 4 asked by appellants, was calculated to mislead, and we think was properly refused.

For the reasons above given the judgment must be reversed and the cause remanded for a new trial.

The motion to tax costs of supplemental abstract against appellants (which was taken with the case), will be denied, for the reason that by our decision all costs are taxable against appellee.

Judgment reversed and cause remanded.

### Catherine S. Smith v. Mary L. Rountree.

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1. *TAXES—Paid by One Person for the Benefit of Another.*—Where taxes and special assessments are paid by a person upon lands conveyed to him by another, and the conveyance is afterward set aside as fraudulent equity and good conscience require that the amounts so paid should be refunded to the person paying them, and slight circumstances are sufficient to raise an implied promise to repay the same.

2. *APPELLATE COURT PRACTICE—Cross Errors. When Required.*—An appellee can not raise the question in the Appellate Court as to whether the recovery is as large as it ought to be, under the evidence in the case, without the assignment of cross-errors raising the question.

*Assumpsit, for money paid.* Trial in the Circuit Court of Lake County: the Hon. CHARLES H. DONNELLY, Judge, presiding. Finding and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1899. Affirmed. Opinion filed May 19, 1899. Rehearing denied October 4, 1899.

W. E. HUGHES, attorney for appellant.

GEO. HUNT, attorney for appellee; JAMES R. WARD, of counsel.

MR. JUSTICE CRABTREE delivered the opinion of the court.

This was an action of assumpsit, by appellee against appellant, to recover an amount claimed by the former to be due her on various items of account and two promissory notes appearing in the record and evidence. A jury being waived, the cause was tried by the court, with a finding in favor of appellee for \$866.29, upon which judgment was rendered after a motion for new trial was overruled, and the defendant appealed to this court.

The only items upon which judgment appears to have been rendered in favor of appellee were two promissory notes of \$100 each, with several years interest thereon, and also certain claims for taxes and special assessments paid by appellee on lands belonging to appellant.

As to the promissory notes, there seems to be little, if any, complaint, the controversy arising upon the allowance for taxes and special assessments paid by appellee upon real estate which had previously been conveyed to her by appellant, but the deeds to which were afterward set aside by a decree of the Circuit Court of Lake County, which decree was affirmed by the Supreme Court in *Rountree v. Smith*, 152 Ill. 493, to which reference is made for a statement of the facts relating to such conveyances, as well as the relations and circumstances of the parties. These taxes and special assessments appear to have been paid in 1892 for the levy of 1891. It is contended by appellant that these payments were made by appellee in support of a hostile title set up by her against the real owner, the appellant, and that no recovery can be had therefor without proof of a special request by appellant upon appellee to pay the same. Without going into the evidence in detail, we think, as to a part of these taxes, a special request was sufficiently proven, and as to the remainder, we are of the opinion, under all the facts and circumstances appearing in the evidence, that, in equity and good conscience, these amounts paid out having inured to the benefit of appellant, and she, by her own acts, having rendered the payments of no benefit to appellee, the latter should have the same repaid

to her, and that the circumstances are sufficient to raise an implied promise to pay. It is questionable, under the evidence, whether the recovery is as large as it ought to be, in view of all the care and kindness bestowed on appellant by appellee, and all the services rendered by the latter, by way of attendance in sickness, nursing, board and matters of that nature, but as no cross-errors have been assigned we need not consider that question at any length; but it is not improper to say the evidence shows that for several years appellee was unremitting in her care and attention of appellant, when the latter was in ill health, bathing her constantly, washing her person, combing her hair, and giving her all the kindly care and nursing which one in her weak state of health required, and for which appellee received no pay whatever, either for board or nursing. The deeds which appellant made to appellee, and which the latter insists were executed for the purpose of requiting the kindness she had bestowed upon appellant, were set aside at the suit of the latter, as above stated, and now it is sought to defeat appellee in the recovery of the taxes and special assessments she paid on these lands conveyed to her, not, as we conceive, in support of a hostile title, but to protect them from sale for taxes. Appellant did not pay them; appellee did. As we have said, the payments inured to the benefit of appellant, by protecting the property from tax sales, and we see no just reason why these items should not be refunded to appellee. We think the finding of the court allowing these items to appellee was just and right. The proceedings in the chancery suit referred to do not, in our judgment, constitute any bar or estoppel to the maintenance of this suit for a recovery of the items allowed for.

Complaint is made as to the action of the court on propositions of law.

We do not regard the sixth proposition, asked by defendant, as being applicable to the facts of this case. It assumes the setting up of a hostile title by the mere filing of the deeds for record. While it was settled in the chancery case that appellant was entitled to a reconveyance of the

lands deeded to appellee, it ought not to be assumed in this case that when the deeds were filed for record appellee was intending to do anything antagonistic to the rights of appellant. We think the sixth proposition was properly refused. There was no error in the rulings of the court on other propositions of law. A careful examination of the whole record satisfies us that no injustice has been done appellant, and the judgment will be affirmed.

### Marshall Field & Co. v. Charles W. Haish.

1. *GUARANTY—Mutual Assent of the Parties Required.*—A contract of guaranty can only be made by the mutual assent of the parties. If the contract is signed by the guarantor, at the request of the other party, if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is sufficient and the delivery of the guaranty to him, or to another, for his use, completes the contract.

2. *SAME—When Without Consideration.*—If a contract of guaranty is signed by the guarantor, without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is, in legal effect, an offer on the part of the guarantor, and needs an acceptance by the other party to complete it.

3. *SAME—Words Descriptio Personæ.*—In a guaranty of payment for goods sold on credit "to W. E. Hart, of Malta," the words "of Malta" are merely descriptive of the person, and the guaranty is not confined to goods sold to "Hart" while he continued to do business at Malta.

*Assumpsit*, on a contract of guaranty. Error to the Circuit Court of De Kalb County; the Hon. CHARLES A. BISHOP, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed July 20, 1899. Rehearing denied October 5, 1899.

ROBERT W. WRIGHT, attorney for plaintiff in error.

JONES & ROGERS, attorneys for defendant in error.

MR. JUSTICE DIBELL delivered the opinion of the court.

On January 25, 1892, Charles W. Haish signed and delivered to Marshall Field & Co. an instrument of that date, the body of which was as follows:

"For and in consideration of one dollar, to me in hand

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paid, the receipt whereof is hereby acknowledged, and the further consideration that Marshall Field & Co. sell goods and merchandise upon credit to W. E. Hart of Malta, county of DeKalb, and State of Illinois, I do hereby guarantee to Marshall Field & Co., the payment at maturity (waiving notice of non-payment), and in accordance with the terms of sale, of the prices and values of all goods and merchandise so sold by them to the said W. E. Hart, from time to time, on and after the date hereof, until notice in writing signed by me, to said Marshall Field & Co., of the withdrawal of this guarantee; and I further agree to pay said Marshall Field & Co. all costs, expenses and reasonable attorney's fees paid or incurred by them in endeavoring to obtain payment for such goods and merchandise from said W. E. Hart or myself, it being understood that my liability shall not, at any time, exceed \$500."

Thereafter Marshall Field & Co. sold goods to W. E. Hart upon credit, in reliance upon said guaranty, but did not notify Haish his guaranty was accepted. At the time this instrument was executed Haish was a banker at Malta, in DeKalb county, and Hart was a merchant doing business a few doors from Haish's bank. Hart continued in business at Malta about two years, and then removed to La Salle, and still later to Mendota, and thereafter to Marseilles, all in La Salle county, next south of De Kalb county. Haish knew of Hart's removals. Between September 9, 1896, and November 18, 1896, Hart became in arrears to Marshall Field & Co., for merchandise sold to him after he removed to Marseilles, in the sum of \$305.39. Under date of December 16, 1896, Marshall Field & Co. wrote Haish as follows:

"You gave us some time a guaranty for goods sold on credit to W. E. Hart, limited as to amount and without limit as to time. We have been selling him ever since with a satisfactory record until the present. He now owes us some bills overdue, which he does not pay, and it now seems our duty to send you a statement of his account, showing everything due and not due, so that you may be advised of the situation and possibly protect yourself, if necessary, from any loss. We do not know that anything is the matter except that he does not pay."

To this Haish on the same day replied as follows:

"Yours of December 16th at hand and noted. As regards

the W. E. Hart matter at Marseilles, would say that he is all O. K. as soon as he can make his collections. I will write him and punch him up, and I think that is all that you can do, but be sure and do that or send it to him for collection. I am sorry that he does not, in some way, keep up his payments. I hereby withdraw my guaranty on all future sales to W. E. Hart."

It is stipulated Marshall Field & Co. used due diligence to collect from Hart, but without success. Thereafter Marshall Field & Co. brought this suit against Haish upon said guaranty. The general issue only was pleaded. Jury was waived and there was a trial, and finding and judgment for defendant, from which plaintiff prosecutes this writ of error.

The rulings of the court below upon propositions of law held and refused show that the judgment for defendant was based upon the conclusions, first, that this was not an original undertaking, and was not binding upon Haish till he was notified within a reasonable time thereafter that plaintiff accepted him as guarantor, and not having been so notified he never became liable; and, second, that the guaranty did not bind Haish for sales to Hart after the latter left Malta. We are unable to concur in these conclusions.

First. The proof shows Marshall Field & Co. sent this instrument by mail to Haish, filled out, except as to the amount for which he would become responsible, and that Haish wrote in the amount and signed the instrument and returned it to Marshall Field & Co. by mail. We regard this as a request from Marshall Field & Co. to Haish to sign this instrument and become a guarantor of Hart to such an amount as he might choose to insert. By inserting the amount he chose, and signing and returning the instrument, the contract was completed, without any notice from Marshall Field & Co. that they accepted Haish as guarantor. If Haish had originated the proposition, then, in order to produce a meeting of the minds of the parties, it would have been necessary Marshall Field & Co. should notify Haish of their acceptance of the proposal. The rules governing such contracts are, we think, properly stated in *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524, as follows:



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"A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him, or for his use, completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is, in legal effect, an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract."

Second. The terms of the contract of guaranty do not limit it to sales to Hart while he did business at Malta. The words therein, "W. E. Hart, of Malta," are merely descriptive of the person. We can not import into the contract words which the parties could have inserted but did not choose to. Haish knew of Hart's removal from Malta, and had power to terminate the guaranty then or at any time by notice in writing. He did so terminate it under date of December 16, 1896, and under the proofs before us we are of opinion his contract bound him till that notice was delivered.

The judgment is reversed and the cause remanded.

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P. N. Granville v. N. S. Young.

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1. **LIMITATIONS—***Payments by One Joint Debtor.*—One joint debtor can not, by a partial payment made without knowledge, assent, or subsequent ratification of the other, bind him so as to authorize the inference of a new promise on the part of the latter and avoid the effect of the statute of limitations.

2. **SAME—***Payments by One Joint Debtor with the Acquiescence of the Other.*—When payments are made from time to time by one joint debtor with the knowledge, consent or ratification of the other, the running of the statute is arrested as to both the joint debtors.

**Assumpsit**, on a promissory note. Appeal from the County Court of Knox County; the Hon. PHILIP S. POST, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

CARNEY, SHUMWAY & RICE, attorneys for appellant.

COOKE & STEVENS, attorneys for appellee.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was an action of assumpsit, commenced December 1, 1898, by appellee against appellant, to recover the amount claimed to be due upon a promissory note, dated January 1, 1885, for the sum of \$400, payable two years after date to the order of appellee, signed by Axel Gabrielson, Alex. Hoffland and appellant, and bearing eight per cent interest. There was a declaration in the usual form, to which the defendant pleaded the general issue, statute of limitations, and also release of surety by extension of time. Issues were joined, and upon a trial by jury the plaintiff had a verdict for \$458.66. A motion for new trial was overruled and judgment entered on the verdict. The defendant prosecutes this appeal.

Although the record does not show the fact, it is stated in argument and not denied, that this was a second trial of the cause and that a former jury returned a similar verdict in favor of appellee.

The note became due January 1, 1887, and as the suit was not begun until more than ten years thereafter, unless a new promise, or facts equivalent thereto have been proven, the statute of limitations would have barred the action.

It appears from the evidence, that payments were made and indorsed upon the note early every year after its execution and delivery. These payments were made by Gabrielson, who was the principal, appellant being merely a surety. In *Boynton v. Spafford*, Adm'x, 61 Ill. App. 384, we held that one joint debtor can not, by a partial payment made without knowledge, assent, or subsequent ratification of

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the other, bind the latter so as to authorize the inference of a new promise on his part and avoid the effect of the statute of limitations. But we are of the opinion that when payments are made from time to time by one joint debtor, with the knowledge, consent and ratification of the other, the running of the statute is arrested as to both the joint debtors. The facts in this case seem to be as follows:

Payments of interest were made from year to year by Gabrielson, the principal. Appellee testifies that he had three conversations with appellant concerning these payments which were indorsed in writing upon the note. One in 1894, one in 1895 and the third after the ten years had expired. The one in 1894 is the most important of the three. Appellee swears that in that conversation appellant asked him if Axel (Gabrielson) kept up the interest on the note. Appellee answered that he did, and appellant replied that "that was all right so long as the interest was paid." This was some seven years after the note was due, of which fact appellant had full knowledge. It is true appellant denies this conversation or any conversation in 1894 concerning the note, but the jury saw the witnesses and heard them testify, and it was for them to say where the truth lay, and to give credence as they deemed the parties entitled to it. In such a state of the evidence we do not feel authorized to disturb the finding of the jury, especially when two juries have found the same way upon the same evidence. We must therefore assume that appellant did use the words sworn to by appellee when speaking of the note in 1894. Was this language a ratification on the part of appellant? Did he mean merely that he was satisfied or pleased that the interest was kept paid on the note by the principal, or did he mean that he was content to let the note run so long as the interest was paid? We think the latter is the only reasonable construction to be placed upon the language used, and certainly the only one which would be fair and just to appellee. As to the latter it could only be "all right" by the payment being regarded as binding upon the surety to keep the note alive. Appellant can only be under-

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stood as intending to assure appellee that the note was good and binding upon appellant so long as the interest was paid. If appellant intended anything other than this, then his purpose was to mislead appellee to his injury; to lull him into security until the statute of limitations had become a bar to any action on the note. This we think was not his intention, and we hold there was such a ratification of the payments as prevented the bar of the statute in favor of appellant.

We have been referred to the case of *Littlefield v. Littlefield*, 91 N. Y. 203, as sustaining a contrary view; but the facts of that case are materially different from those in the case at bar, and we do not regard it as of controlling force in the decision of this case. In the case of *Lash v. Bozarth*, 78 Ill. App. 196, also referred to by counsel for appellant, the question of ratification was not involved.

We think the court committed no error in the instructions, and we do not deem it necessary to discuss the objections made thereto. Finding no error in the record the judgment will be affirmed. Judgment affirmed.

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### Jacob A. Henry v. Benjamin F. Stewart.

1. **REAL ESTATE BROKER**—*When Entitled to Commissions.*—If a purchaser is induced to apply to the owner through the instrumentality of the broker, or through means employed by the broker, or if the sale is effected through the efforts of the broker, or through information derived from him, or where the seller consummates a sale of property upon different terms than those proposed to his agent, the broker will be entitled to his commissions.

**Assumpsit**, for commissions. Appeal from the Circuit Court of Will County; the Hon. ROBERT W. HILSCHER, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

GEORGE S. HOUSE and EGBERT PHELPS, attorneys for appellant.

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D. A. HOLMES and E. MEERS, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a suit in assumpsit brought by appellee to recover damages from appellant by way of commissions claimed by him as an agent or broker, for the sale of the Joliet Street Railway, formerly owned by appellant.

The declaration consisted of the ordinary consolidated common counts, with an affidavit of merits attached thereto, wherein the demand was stated to be "for services as agent and broker's commissions" on the sale of said railway system, its equipment and appurtenances, and that the amount due plaintiff after allowing all just credits, deductions and set-offs, was \$13,000. There was a plea of the general issue and an affidavit of merits to the entire cause of action. Upon the trial the jury gave a verdict for plaintiff for \$8,850, for which amount, a motion for a new trial having been overruled, judgment was entered by the court.

Appellee testified on the trial that appellant came to his office in 1893, and talked to him concerning the sale of the street railway; that appellant asked him at the time to find a customer for the railway, who had the ability to buy, and said if appellee would bring him such a customer, he would pay him a commission of five per cent on the sale; that appellant had made and forwarded to appellee an inventory of the railway property, and also an abstract of the books, showing receipts and disbursements of the same in detail back to 1891; that appellee prepared a prospectus and also made several trips to the East for the purpose of interviewing persons who had the ability to buy, but found no purchaser at that time; that he afterwards had conversations from time to time with appellant, and in 1896 the latter again urged him earnestly to sell the property, saying that he had heavy liabilities, was seventy-two years of age and desired to be released from the burdens and liabilities of business; that he, appellee, was connected with a manufacturing company as a salesman in the street railway department and had the privilege from his company of handling street rail-

way properties and receiving commissions in the negotiation of sales of them. The proof showed that in the last mentioned year, appellee, after some correspondence and conversation with him in regard to the property, induced one William B. McKinley to go with him to Joliet to see appellant as a prospective purchaser of said property. This meeting between McKinley and appellee was followed by others, six in all, at three of which appellee was present. McKinley secured an option on the property and went East to consult with a syndicate of moneyed men, who were engaged in furnishing money for such enterprises. Through the efforts of McKinley, as a result of his visit East, a contract in reference to the sale of said property was on June 4, 1896, entered into between appellant and one Henry P. Cox, of Portland, Maine, who was at the head of said syndicate.

After some further negotiations the contract was substantially consummated, the stock turned over to the syndicate, and on August 8, 1896, a deed for the property made to McKinley.

The principal point made and argued by appellant is that the verdict was not sustained by the evidence. Appellant, while admitting that he had talked with appellee of his desire to sell the road, denied that he had ever employed the latter to sell the stock or property of the railway company, or to pay him a commission for the same. Appellee, however, is corroborated in his statements concerning his alleged employment by other witnesses. McKinley testified that he first learned that the railway was for sale through appellee and that the latter went with him to Joliet and introduced him to appellant.

The witness Weeks, testified that he also had negotiations with appellant regarding the railway property and that during the same the latter told him that Stewart was selling the road to other parties; that he must hurry up, for if he didn't, Stewart would take the road; that he would take a lower price from witness because he would save the difference in commissions, as witness was to have no commission, but was dealing with purchasers themselves.

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The witness Dwyer, testified that he officed with appellee at the time said negotiations were pending, and saw appellant in the office of appellee a number of times and heard the former tell the latter in the spring or summer of 1896, that "he wished the property would be sold soon." Appellant is not corroborated in his statements concerning the same matter, and the preponderance of the proof on that subject is largely in favor of appellee. It is argued, however, by counsel for appellant, that the sale was really made by McKinley to the syndicate and that therefore appellee is not entitled to commissions. But the sale was brought about by the fact that appellee brought McKinley and appellant together, and the deed to the property was made directly to McKinley. It was immaterial to appellant whether McKinley furnished the money himself for the purpose or obtained it from other people, or whether McKinley or some other party was to become the real owner of the stock and property.

The matter of most importance to appellant was to make a sale of the property and this he effected through the efforts of appellee. Nor was it material, if a fact, that others assisted in the negotiations after they were commenced, nor that the sale was made upon different terms than those originally contemplated.

In *Hafner v. Herron*, 165 Ill. 242, it is said :

"One broker may assist another in making a sale. (*Carter v. Webster*, 79 Ill. 435.) Nor is it always necessary that the purchaser should be actually introduced to the owner by the broker, provided it appears affirmatively, that the purchaser was induced to apply to the owner through the instrumentality of the broker, or through means employed by the broker. It is sufficient if the sale is effected through the efforts of the broker, or through information derived from him. It is also true, that where the seller consummates a sale of property upon different terms than those proposed to his agent, the latter will not be thereby deprived of his right to his commissions."

In this case it appears from a preponderance of the evidence that the property was placed in the hands of appellee for sale, and that it was disposed of through his

instrumentality. He is therefore entitled to recover his fees for his services.

The objections urged to instructions by appellant were based upon the theory that appellee was not entitled to recover, because the sale in question was not made directly to McKinley but to other persons. This, under the circumstances of the case, as we have above seen, was unimportant, and the court therefore committed no error in its rulings upon the instructions. Appellant, when on the witness stand, was asked whether or not he paid anything of value to McKinley on account of making this sale to him as commission or otherwise, and answered: "Well, I received \$50,000 of stock; he called for \$15,000 of that; sent his man over there to get it; I did not know what he wanted with that, I suppose commissions." Counsel for appellee moved to strike out this answer and the motion was sustained. It is urged that the court erred in excluding this answer. The witness McKinley had testified on cross-examination in answer to a question by appellant's counsel, that he had not acted as broker for the sale of the property, and had not retained the \$15,000 of the purchase money for commissions. If the object of the question asked by appellant, above referred to, was to contradict the statement of McKinley, the objection to the answer was properly sustained, because the statement was immaterial; and if the object was to show the payment of a commission to McKinley for making the sale, as a defense to appellee's claim, the answer was also properly excluded.

Even if it were true that appellee paid other persons than appellant a commission for making the sale, that fact, of itself, would be no defense to an action by appellee upon his contract for commissions.

In support of the motion for a new trial, appellant filed his own affidavit and that of one J. W. Folk, stating additional facts in their knowledge, which did not appear in evidence. Both these parties were witnesses on the trial of the case, and there is no good reason stated why the evidence contained in the affidavits should not have been intro-



duced on the trial. The evidence set forth in the affidavits was at best merely cumulative and in such case the application for a new trial based thereon, should be denied. *Bemis v. Horner*, 165 Ill. 347.

Appellant also filed an additional affidavit reciting what purported to be a letter to him from appellee, written after the sale had taken place. The letter tended to show that plaintiff expected a reasonable compensation, thus implying there had been no previous agreement for a fixed rate. As appellant had objected to permitting proof of reasonable compensation on the part of appellee, and the objection had been sustained by the court, the production of the letter afforded no reason for granting a new trial.

We are of opinion that the verdict of the jury was sustained by the evidence, and that there was no error committed by the court in the trial of the cause. The judgment of the court below will therefore be affirmed.

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### The Chicago, R. I. & P. Ry. Co. v. Phil. E. Downey, Adm.

1. *JURORS—Parties to Suits Pending for Trial—Challenge.*—In the challenge of a juror on the ground that he was a party to a suit pending for trial at the time, it is not for the court to say whether the cause is pending for trial or not. The mere fact that it is not on the trial list is not conclusive. A case may be put on the trial list at any time by agreement and stand ready for trial.

2. *ORDINARY CARE—Habits of Care of Deceased Persons.*—Where there are no witnesses to an accident whose testimony can throw light upon the question as to whether or not the deceased was exercising due care for his own safety at the time of the accident, evidence of the habits of care of the deceased is competent.

3. *JURY—Polling.*—The court ordered the jury to be polled; the clerk called the names of eleven only of the jurors, and each was asked, "Was and is this your verdict?" and each of the eleven answered "Yes." And thereupon the court said to the jury, "You are discharged from further consideration of this cause and for the term." Before any of them had left the jury box, the clerk discovered that one juror had not been polled or interrogated as to the verdict. Counsel for the defendant had not noticed the omission and thus far made no objection; but when the court's attention was called to the fact it

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ordered that the juror be polled, and against appellant's objection it was done, and being asked the question, "Was and is this your verdict?" the juror answered "Yes," and the jury was then discharged. *Held*, no error.

**Action in Case.**—Death from negligent act. Appeal from the Circuit Court of Rock Island County; the Hon. WILLIAM H. GAST, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed October 12, 1899.

HENRY CURTIS and W. T. RANKIN, attorneys for appellant; ROBERT MATHER, of counsel.

LOONEY & KELLY and J. T. KENWORTHY, attorneys for appellee.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

Thomas Hillings, plaintiff's intestate, was killed at Sheffield, Illinois, in January or February, 1897, the precise date not being definitely fixed by the evidence. He was run over by one of appellant's engines which was switching in the company's yards at Sheffield. This action was brought to recover damages alleged to have resulted to his next of kin by reason of his death. The case was tried by a jury who found a verdict in favor of appellee for \$2,800. A motion for new trial was overruled and judgment entered on the verdict. Appellant prosecutes this appeal, and assigns for error the admission of improper evidence, exclusion of proper evidence, the giving of improper instructions and the refusal of proper instructions; overruling the defendant's motion to exclude the evidence and direct a verdict in its favor; allowing a juror to be polled after the jury had been discharged; refusing to allow defendant's challenge to the juror Jacob Larue; that the verdict is contrary to the law and the evidence; and the court erred in overruling the motion for new trial and entering judgment on the verdict.

The declaration contained five counts, and the charges of negligence therein contained were, that the engine which

killed Hillings was backed over the public crossing in Sheffield at a high and dangerous rate of speed, without any light on the rear of the engine or tender, and without giving any warning or signal, striking decedent while he was upon said crossing and in the exercise of due care on his part; starting the engine without ringing the bell or sounding the whistle a reasonable time before starting; running the engine at a speed of fifteen miles an hour in violation of an ordinance of the village of Sheffield, which limited the rate of speed to ten miles an hour; and that the engine was run between the water tank and Sheffield without the bell being rung, in violation of an ordinance of Sheffield which required bells on engines to be rung continuously while running through the corporate limits of the village.

The facts of the case as we gather them from the evidence are, that the deceased was a man about sixty years old, who had been for some years night watchman of the village of Sheffield, and it was his custom to meet incoming trains and escort passengers to the hotel or to their homes. On the night he was killed one of appellant's freight trains had arrived from the west and was left standing west of the village, near some coal chutes, while the engine was engaged in switching, after which the engine was taken to a water crane a short distance east of the railway station, where it took water. Appellant's railway at this point runs nearly east and west. Between the station and the water crane there was a crossing over the railway which formed the extension of Main street in the village. Whether this was a public crossing or not seems to be a matter of dispute, but we think the evidence shows it was at least recognized by appellant as a crossing over which the public had a right to pass. On the west side of this crossing or road was a plank sidewalk, running as far as the tracks, the center of the sidewalk being a little over fifty-four feet from the water crane. While the fireman was taking water, he carried a lantern containing a white light, and the engineer was oiling his engine. After taking water the fireman

hung his lantern on a nail in the rear of the projecting roof of the cab and called "All right" to the engineer, who proceeded to mount the engine and take his place in the cab. About this time a west bound passenger train arrived at the station and after discharging its passengers proceeded on its way. A moment or two after the passenger train departed the engineer of the freight train started to back his engine toward the coal chutes west of the station. There is the usual contradiction in the evidence as to whether the bell was rung or not, and also as to the speed of the engine. Appellant's contention, supported by positive testimony of some of its witnesses, is that the engine was equipped with an automatic air bell ringer which was put in operation before the engine was started, and that the bell continued to ring while the engine was passing over the crossing; also that when deceased was struck the engine was not moving at a speed exceeding four miles an hour. As these are questions to be determined by the jury upon another trial we forbear commenting upon the conflicting evidence on these points. Harvey Squires and William Humphrey, who were witnesses in the case, had arrived on the passenger train and alighted on the north platform of the station, near the center of the passenger depot. They did not see deceased about the platform or station. These witnesses proceeded east on the platform, intending to pass over the tracks on the plank sidewalk running south toward the town. While still on the platform they observed the engine standing at the water crane, and when they reached the crossing the engine was just passing over, and they waited for it to go by, so they could cross, and after it had passed them they saw something fall from the rear of the tender, heard a groan, and on going to the spot they found the body of Thomas Hillings, so badly injured that he died a short time thereafter. The spot where he fell was about twenty-eight feet from the west line of the sidewalk on which Squires and Humphrey had been standing, and was marked by a pool of blood. The cane, which deceased was carrying, was found a short distance east of the point where

the body was found, but this was not discovered until after daylight in the morning. Where the deceased came from, or which way he was going, is not shown by the evidence, and can only be matter of conjecture. No witness testifies to seeing him about the station that morning and the witnesses Squires and Humphrey did not see him at the crossing, nor until he was struck by the engine outside of the street lines. It was a very cold morning, and the evidence shows deceased had on a heavy plush cap which could be turned down over the ears, and it was in fact so turned down when he was found after being struck. He had been for years familiar with the station, the crossing in question, the movements of trains and engines in the station grounds, and in some respects the accident seems hard to be accounted for, because no reason is perceived why deceased could not have seen the engine as well as Squires and Humphrey, had he been at all observant for his own safety.

While the jury were being impaneled it appeared from the examination of Jacob Larue, that he was a party to a suit then pending in the Circuit Court in which the case at bar was being tried. He was challenged for cause because he was a party to such pending suit, but the challenge was refused, the court remarking :

“ It is not on the calendar for trial. It is not on my list for trial. I take it that the clause ‘ pending for trial,’ means that the case is ready to be tried. The challenge for cause will be denied.”

We think the challenge should have been sustained. It is not for the court to say whether the cause was “ pending for trial ” or not. The mere fact it was not on the trial list was not conclusive. For anything that appears in the record, the case might have been put on the trial list at any time by agreement, and the cause stand ready for trial. Counsel for appellee argues that it does not appear from the record that appellant exhausted its peremptory challenges and therefore was not harmed by this ruling of the court. But the record shows that appellant peremptorily challenged the jurors Fones, Schmidt and Larue. This was all the peremptory challenges it was entitled to under the

statute, hence its right to challenge peremptorily was exhausted. We think the better opinion is, it was not bound to challenge another juror whom it might be compelled to take, and thus possibly incur his prejudice, in order to properly save the question as to the propriety of the court's action in overruling the challenge. It appears from the affidavit of Henry Curtis, of counsel for appellant, filed in support of the motion for a new trial, and which is incorporated into the bill of exceptions and thus made a part of the record, the appellant desired to challenge other jurors but could not do so for the reason its peremptory challenges were exhausted on the jurors Fones, Schmidt and Larue. It further appears from the same affidavit, that under the rules and practice of the court, causes could be placed upon the trial list at any time by agreement of the parties, and cases had been so added to the trial list at that very term of court, and that no order of continuance had been entered in the Larue case. Under all the circumstances we think it was error for the court to refuse the challenge. It is argued by counsel for appellee that there was in fact no challenge, but it is evident from the language used by the trial judge that he understood that appellant's counsel challenged juror Larue for cause. During the trial a witness was asked what he knew about the defendant company giving signals when approaching the crossing in question, in the way of ringing a bell or blowing a whistle prior to the accident to appellee's intestate.

The question was objected to by appellant, but the witness was permitted to answer and appellant excepted. This ruling of the court is assigned for error. If this evidence was competent at all it could only have been for the purpose of showing that the railroad company recognized the crossing in question as a public crossing. We think it was error to receive this evidence without in some way limiting its effect to the only legitimate purpose for which it could have been admitted. There was a controversy as to whether the bell was rung at the time the deceased was killed. There was evidence that at previous times appellant's engines had

passed over the crossing without ringing the bell. The jury might well suppose if that had been so on former occasions it might also have been true on the night of the accident. The evidence could not fail of being highly prejudicial to appellant. To say the very least, the case was extremely doubtful on the facts, and it was of the highest importance no improper evidence should be permitted to go to the jury.

It is assigned for error that the court admitted evidence, over appellant's objection, as to the habits of care of the deceased, it being claimed by appellant that there were eye-witnesses to the accident. We are of the opinion this point is not well taken. It can not properly be said there were eye-witnesses to the accident. True, Squires and Humphrey saw the deceased fall at the time the tender struck him, but they had not seen him before and did not know he was there, and their testimony could shed no light whatever upon the question as to whether or not deceased was exercising due care for his own safety prior to and at the time he was struck, other than may be drawn as inferences from the circumstances. Hence we think it was not error to admit the evidence.

When the jury returned their verdict into court and it had been read, appellant's counsel asked that the jury be polled; the request was granted and the polling of the jury was ordered. The clerk called the names of eleven only of the jurors, and each was asked, "Was and is this your verdict?" and each of the eleven answered "Yes." And thereupon the court said to the jury, "You are discharged from further consideration of this cause and for the term." Some of the jurors arose to depart, but before any of them had left the jury box, the clerk discovered that one juror, John Evans, had not been polled or interrogated as to the verdict. Appellant's counsel had not noticed the omission and thus far made no objection, but when the court's attention was called to the facts, it ordered that John Evans be polled, and against appellant's objection it was done, and being asked the question "Was and is this your verdict?"

juror Evans answered "Yes" and the jury were then discharged.

It is insisted that this was error and that the jury was not legally polled. We think there was no error in this action of the court. Although the jurors were told they were discharged, they were still in the jury box and within the control of the court. They had not separated, and no reason is perceived why the omission could not properly be cured in the manner it was. Appellant's counsel made no objection to the polling of the eleven jurors, and but for the discovery by the clerk of the omission to call juror Evans the record would have shown the jury properly polled, and then after the jury had been discharged it would no doubt have been too late to raise the objection. We think the point is without substantial merit and must be decided against appellant.

Error is assigned upon the action of the court in giving, refusing and modifying instructions, but as no mention is made of these assignments of error in the argument, they must be regarded as waived, and we need not consider them; but for the errors indicated the judgment is reversed and the cause remanded.

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### City of Elgin v. Elgin Hydraulic Co.

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1. **RECOVERY**—*Must be by a Party in Interest.*—It is the general rule that when injury is done to property a recovery for the same can only be had by some person who has an interest in the property, legal or equitable, which the law recognizes.

2. **SAME**—*Elgin Hydraulic Company.*—The Elgin Hydraulic Company was organized in 1867 (Private Laws 1867, Vol. 2, 88), as a means of controlling the use of the water, as between the several owners of the same on both sides of Fox river, and to keep the dam, race-ways, gates, etc., in repair, and as such has no such property interest in the water of the river as authorizes it to bring a suit for the use and appropriation of the water from the river by the city of Elgin for city purposes.

3. **CONSTRUCTION OF STATUTES**—*The Act to Authorize the Building of a Dam Across Fox River.*—The special act of 1839, entitled "An act to



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enable James T. Gifford and Samuel J. Kimball to build a dam across the Fox river," approved February 15, 1839 (Laws 1839, 108), is not in the nature of a contract, which can not be modified or annulled by the State, but is in the nature of a license, which can be revoked by a subsequent act of the legislature.

4. *SAME—Rights of the State Not Lost.*—By the passage of the special act of 1839, giving Clifford and Kimball authority to erect the dam across Fox river, the State did not part with any right it may have had to control said stream for the benefit of the general public.

5. *WATERS—Right of the Public Along Fox River.*—The right of the public residing along Fox river to take water out of the same for domestic, sanitary and fire purposes, is paramount to the right of the owners of said water power to use it for the purpose of propelling the machinery of their mills.

**Action in Case**, to recover damages for appropriating water. Appeal from the Circuit Court of Kane County; the Hon. GEORGE W. BROWN, Judge, presiding. Heard in this court at the May term, 1899. Reversed. Opinion filed October 12, 1899.

CHAS. H. FISHER and CHAS. L. ABBOTT, attorneys for appellant; R. N. BORSFORD, of counsel.

The first contention is that the appellee can not maintain this action because it has no pecuniary or property rights in the damages sought to be recovered. *Elgin Hydraulic Co. v. City of Elgin*, 74 Ill. 433; *Peoria Insurance Co. v. Frost*, 37 Ill. 333.

The appellee is not a riparian proprietor, and therefore has no pecuniary interest in the damages sought to be recovered by reason of ownership of any riparian rights. It is not the owner of any right or title, as shown by the record, in the waters flowing in Fox river. *Jones v. West-erhausen*, 18 Atl. Rep. 1072.

If there has been any diminution of water, caused by appellant's use thereof, for which there could be a right of recovery, the right of action is alone in the owners of the several mill properties.

Fox river is in law and fact a navigable stream, and its waters are so far the property of the State that the State may control them for public purposes, regulate their flow and authorize municipalities within the borders of the State to take for their citizens such waters for domestic purposes,

or for any reasonable use thereof by the cities of the State. Ordinance of 1887, Art. IV, S. & C. St. 45; Laws of Illinois, 1839-40, page 98; Watuppa Reservoir Co. v. City of Fall River, 147 Mass. 548.

The city of Elgin, in taking water from Fox river for ordinary public use and for the use of its inhabitants by a system of water-works, is not subject to same rule which obtains between riparian owners, so as to make the city liable in this action for any diversion of water for such use. *Rundell v. Canal Co.*, 14 How. 80; *St. Anthony Falls W. P. Co. v. Board of Water Com'rs*, 168 U. S. 349; *Minneapolis Mill Co. v. Board of Water Com'rs of City of St. Paul (Minn.)*, 58 N. W. Rep. 33.

The right to use water from the large rivers, ponds and lakes within this State, by the public, for domestic purposes, is primary, and the right of individuals to use it as a mechanical power is secondary, and, to the extent that these rights conflict, that for public and domestic use is paramount. *Evans v. Merriweather*, 3 Scam. 492; *City of Auburn v. Union Water Power Co.*, 38 Atl. Rep. 561; *People v. Tibbetts*, 19 N. Y. 528.

Under the law of this State applicable thereto, the city of Elgin is authorized to take from Fox river its source of supply for furnishing its citizens with water, in the manner it is now doing, without making any compensation therefor to appellee, or to the owners of water power in said city. The mode and manner of such taking here complained of is but a lawful and reasonable use of such water. *Evans v. Merriweather*, 3 Scam. 492; *Lamprey v. Metcalf (Minn.)*, 53 N. W. Rep. 1139; *Minneapolis Mill Co. v. Board of Water Com'rs City of St. Paul (Minn.)*, 58 N. W. Rep. 33.

When private and public rights come in conflict in the use of public waters, those of the public are paramount. The State can not grant such paramount right to individuals or corporations. *Black River Improvement Co. v. La Crosse*, 54 Wis. 659; *Philadelphia v. Collins*, 68 Pa. St. 106; *Illinois v. Ill. C. R. R. Co.*, 146 U. S. 387.

Municipal bodies act for the State, and to the extent

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authorized, exercise the powers of government, and when so exercising such powers they may, when so authorized, do so without conforming to all other requirements imposed by the practice on natural or artificial persons created for the purpose of business or gain. The city of Elgin is a branch of the State government. *Holmes v. City of Mattoon*, 111 Ill. 27.

Even if there was ever a right of action in the appellee for the cause complained of, such right is barred by the statute of limitations. *City of Centralia v. Wright*, 58 Ill. App. 51.

The court below, in awarding execution against the appellant for judgment and costs, committed error. *City of Carrollton v. Bazzette*, 159 Ill. 284; *Anderson v. Schubert*, 158 Ill. 75.

The nominal judgment rendered by the court for the five years' diminution of the water claimed by appellee, shows that the court regarded the damages as being so infinitesimal as not to be susceptible of commutation. The court, in such case, should have found for defendant. *Gehlen v. Knorr (Ia.)*, 70 N. W. Rep. 757.

J. W. RANSTEAD and D. B. SHERWOOD, attorneys for appellee; CHAS. WHEATON, of counsel.

The common law rule with regard to navigable waters prevails in this State, and no waters are navigable in law, in this State, unless the tide ebbs and flows therein. *Middleton v. Pritchard*, 3 Scam. 510; *Braxton et al. v. Bressaler*, 64 Ill. 488; *Ensminger v. People*, 47 Ill. 384.

The legislature can not, by an act, declare a stream which is not in law navigable, or navigable in a state of nature, to be a navigable stream, so as to deprive the riparian owners of their right to use the water, without affording them compensation. *Gould on Waters*, Sec. 111; *Angell on Water-Courses*, Sec. 536, note 7, and Sec. 541; *Walker v. Board of Public Works*, 16 Ohio, 540; *Morgan v. King*, 35 N. Y. 454; *Sanitary District v. Martin*, 173 Ill. 243.

The Supreme Court of the United States has held that

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the decisions of the various States must control as to what the law in any State is as to riparian rights in navigable streams. *Shively v. Bowlby*, 152 U. S. 1 (14 Sup. Ct. Rep. 548).

Where the government grants land on the bank of a fresh water stream, without reservation, in States where the common law prevails, the grantees own to the middle line of the stream, including the bed of the stream, and all unsurveyed islands, etc. *Grand Rapids and I. Co. v. Butler*, 15 Sup. Ct. Rep. 991, 159 U. S. 87.

A grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread thereof. *Longnor v. Benson*, 8 Mich. 18; *Rice v. Rudyman*, 10 Mich. 135; *Fletcher v. Thunder Boom Co.*, 51 Mich. 277; *Turner v. Holland*, 65 Mich. 453; *City of Grand Rapids v. Powers*, 89 Mich. 94; *Harding v. Gordon*, 140 U. S. 254, quoting *Middleton v. Pritchard*, 3 Scam. 510, with approval.

Where a fresh water stream, although navigable in fact, is held to be private property, because not navigable at common law, the crown, the State or the public, have no rights in it which are not connected with navigation. *Gould on Waters*, Sec. 46; *Braxton v. Bressaler*, 64 Ill. 488; *City of Chicago v. McGinn*, 51 Ill. 266; *Ill. R. P. Co. v. Peoria B. Association*, 38 Ill. 467; *Ensminger v. People*, 47 Ill. 384.

Where a water company connects its work with a lake, or fresh water stream, in those States where the common law prevails, it is liable in damages to other riparian owners if, by unreasonable use of the water, such owners are deprived of a reasonable use thereof. *Valparaiso City Water Co. v. Dickover (Ind.)*, 46 N. E. Rep. 591; *Rigney v. Tacoma Light and Water Co.*, 38 Pac. Rep. 147.

The act authorizing the city of Elgin to establish and maintain water-works, did not authorize it to take any private property, without purchasing the same, or condemning it under the Eminent Domain Act, R. S., Ch. 24, Sec. 176.

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Riparian owners are entitled only to a reasonable use of the waters of the stream, and must so use the water as not to injure other riparian owners. Gould on Waters, Sec. 209, *et seq.*; Batavia Mfg. Co. v. Newton Wagon Co., 91 Ill. 230.

The Supreme Court has held that the riparian owners on the banks of Fox river own to the center thread of the stream, and are entitled to the water and water-power created by the river and the dams thereon. Stolp v. Hoyt et al., 44 Ill. 219.

A riparian owner has no right to use a stream so as to impair or injure the right of property of another proprietor. Evans v. Merriweather, 3 Scam. 494; Plumleigh v. Dawson, 1 Gil. 544; Yarwood v. N. Y. C. & H. R. R. R. Co., 83 N. Y. 400; Marsh v. D., L. & W. Ry. Co., 12 N. Y. Sup. 376; Heilbron v. Fowler Switch Canal Co., 75 Cal. 426; Anderson v. The Cin. South. Ry. Co., 86 Ky. 44; Halsey v. The Lehigh Valley Ry. Co., 16 Vroom (N. J.), 26; Society for Establishing Useful Manufactures et al. v. Morris Canal and Banking Co., 1 Saxton (N. J.), 157.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was an action on the case brought by appellee against appellant to recover damages for the use and appropriation of water from Fox river, by the city of Elgin for city purposes, by means of a system of water-works, constructed and operated by said city, to the alleged injury of appellee.

A jury was waived and the court upon the trial of the case gave a judgment in favor of appellee for nominal damages and costs of suit. There was no controversy as to the main facts in the case. It appeared from the evidence that in the year 1837 James T. Gifford and Samuel Kimball, who were in possession, on opposite sides of the Fox river, of certain lands now within the city limits of the city of Elgin, constructed a dam across said river. In the year 1839 they procured from the legislature an act authorizing them to construct a dam across Fox river at the place in question, although the dam had in fact been already erected.

In 1840 the legislature passed an act declaring "that the Fox river in the counties of La Salle, Kane and McHenry, from its confluence with the Illinois at Ottawa to the northern boundary of the State, is hereby declared a navigable stream, and shall be deemed and held a public highway." At the time of the construction of the dam in question, Gifford and Kimball had no title to the land on the opposite sides of the river, adjoining it, but in 1842 they bought the same and obtained title from the United States government. Afterward the city of Elgin was incorporated, extending over said premises on both sides of the river and other territory.

The original owners of the land and water-power made conveyances of portions of their holdings from time to time to other parties, and in 1867 the several owners of the same, on both sides of the river, organized the Elgin Hydraulic Company as a means of controlling the use of said water as between themselves, and to keep the dam, race-ways, gates, etc., in repair, and obtained a special charter from the legislature of the State, which was approved March 9, 1867. In the year 1887 appellant purchased a strip of land, about an acre in extent, bordering on the Fox river above the city, erecting thereon pumping works, and constructed a system of water-works to supply said city with water for domestic, fire and sanitary purposes.

The water-works plant is located about a mile above the dam, and the latter causes the water to set back up the river about three miles. Appellant, after constructing its water-works system, extended its intake pipe into that portion of the mill-pond created by the dam included within the limits of the boundary of its purchase, and has ever since taken a part of its water for city purposes therefrom. Neither appellee nor the individual owners of the water-power in question objected to the use of the water by appellant, for the purposes named, until the year 1895, when it appearing, as claimed by appellee, that the supply of water to the mills operated by the water-power was becoming materially diminished by reason of the use of the water by appellant, this suit was brought.

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The first contention made by appellant is, that the appellee can not maintain this action, because it has no pecuniary or property rights in the damages sought to be recovered. The declaration charges that during the dry season appellant unlawfully pumped out of the river, through its intake pipe, a large amount of water, by reason whereof the water of the river was insufficient to enable appellee's stockholders to work their machinery in the mills operated by them in as large and beneficial a manner as they otherwise would have done, and whereby appellee was deprived of the full and beneficial use of its property and of the benefits, profits and gains thereof, without appellant's first making compensation therefor.

Appellee was not a riparian owner, however, and had no title to the waters of the Fox river or to said water-power. By its charter its directors were given power to keep the dam and race-ways in good order and repair, and to do such other acts and things as they might deem necessary for the preservation and maintenance of said water-power; to regulate the flumes and gates of the race-way, so as to prevent each of said stockholders from drawing or using more water than properly belonged to him; to direct the manner of drawing the water from the dam and race-ways in time of low water, so as to insure to each stockholder a full and just proportion of said water-power. The charter also provided that the expense of making general repairs and the other expenses incurred by the board in the performance of its duties, should be ratably assessed upon the stockholders "in proportion to the number of square inches owned or represented by them respectively," and also for the manner of making such assessments. It will therefore be seen that the object for which the corporation was created, was, not to hold and own the water-power, but to keep all the appurtenances in repair and regulate the use of the water among those who really owned it.

In the case of *The Elgin Hydraulic Company v. The City of Elgin*, 74 Ill. 433, which was a suit between the same parties brought by the Hydraulic Company against the city

to recover for damages sustained through an act of the city of Elgin in carrying a certain sewer belonging to it into a race-way on the east side of the river, it was said by the court:

"The evidence showed that the Elgin Hydraulic Company was composed of the owners of the water-power at Elgin, who were its stockholders; that the company did not own the race, but that it was built for the benefit of all the owners of water-power on the east side of Fox river. \* \* \* The objection taken to the sufficiency of the proof is, that the race did not belong to the company; that it had no interest in the race, but was a mere agency for the repair of it, and hence had no right of action in itself, for the injury done to the race. But the company was a corporation created for the special purpose of keeping this race-way in repair, had the exclusive charge of it for such purpose, was given power to raise money therefor, and was given the right to sue. The obstruction of the race-way in the manner shown, although the company had no property interest in it, was a pecuniary damage done to the corporation itself, in necessitating, in the performance of its statutory duty, and actually causing, the expenditure of its own money for the removal of the obstruction. \* \* \* This action is not for damage done to the owner of any mill in lessening his power, but only to recover for the expense of removing the obstruction. The mill-owners' damage suggested would be a different one."

It will be seen that the Supreme Court in the above case held that the Hydraulic Company did not own the race and had no property interest in the race-way, and that its right to sustain the action was only by reason of the fact that it was one of its duties to keep the race-way in good order and repair, as provided by its charter; but the court also intimates that for any injury done to the owner of any mill in lessening his power, the damage would accrue to the mill owner himself and not to the Hydraulic Company.

The fact that the supply of water was diminished in the race-ways would not, in any manner, prevent the board of directors of appellee from keeping the dams and race-ways in good order and repair, regulating the supply of water as between the several stockholders, or exercising any of the



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other powers conferred upon them by the charter. It is a general rule that when injury is done to property a recovery for the same can only be had by some person who has an estate in the property, legal or equitable, which the law recognizes. *Peoria Ins. Co. v. Frost*, 37 Ill. 333.

Appellee being merely an agent of the owners of the water-power, organized for their convenience to carry out certain defined purposes, and having no estate of its own, legal or equitable, in the water-power, could not legally maintain this suit against appellant for damages resulting from the diminution of the water supply to the real owners of the water-power.

While in our view of the case the action could not be maintained by appellee, for the reason above stated, yet there are also reasons based upon the merits of the case why, in our opinion, appellee was not entitled to recover. The city of Elgin, by reason of its purchase of the property along the river, where its water-works are located, became a riparian owner, and even if Fox river, as contended for by counsel for appellee, is to be treated in every way as a private stream, then the city is entitled to the use of its proportionate share of the waters of the river. There is no evidence in the record to show that the city has at any time taken more than its lawful share of such waters, and such being the case, no action would lie against it by the owner or owners of the water-power, on account of any diminution in the volume of the water, by reason of the fact that the city had diverted a portion of the same. But there are broader grounds yet upon which this decision may be based. The owners of the water-power at Elgin maintained the mill-dam by reason of the charter granted to them by the State, and their claim of injury depends upon alleged property rights, arising from and resting only upon their right to maintain said dam and control the supply of water afforded by the same. It is claimed by appellee that the act of 1839, giving Gifford and Kimball authority to construct the dam, was in the nature of a contract by the State with them, their heirs and assigns, and could not be revoked

by the State, after they had acted upon it and built the dam; that therefore the act of 1840, declaring Fox river a navigable stream, so far as it affected the water-power created by the dam, must be considered as subject to the rights conferred upon Gifford and Kimball, their heirs and assigns, by the said act of 1839.

In the case of *I. C. R. R. Co. v. Ill.*, 146 U. S. 387, where the question of the right of the legislature to sell or give away the submerged lands in Lake Michigan, along the Chicago lake front, was in question, it was held that such attempted cession of ownership was inoperative to affect, modify, or in any respect to control the sovereignty and dominion of the State over the lands, and that any attempted operation of the act was annulled by a subsequent repealing act. Also that "there can be no irrepealable contract in the conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it."

Our Supreme Court has also in a measure passed upon the question of the power of the legislature to control the use of a stream in a case involving the right to maintain a dam in this same river. In the case of *Parker v. The People*, 111 Ill. 581, it is said:

"When the dam was erected it was without right, and by a trespass on the lands of the government, and before Michael C. Parker purchased the land of the general government, the legislature had, by enactment, in 1840, declared Fox river a navigable stream and public highway. It then follows that he purchased subject to the power of the legislature to control the use of the stream to the same extent it had to regulate the use of other streams in the State which were navigable in fact."

The facts in that case were somewhat similar to those in the case at bar, as Gifford and Kimball erected their dam in the year 1837, but did not obtain title to the adjoining lands until 1842, two years after the Fox river had been declared navigable. The special act giving Gifford and Kimball authority to erect the dam was not, therefore, in the nature of a contract, which could not be modified or

annulled by the State, but was in the nature of a license, which could be revoked by a subsequent act of the legislature. The State, by the act of 1839, did not part with any right it may have had to control said stream for the benefit of the general public. It is true that, according to the evidence, Fox river is not a navigable stream in the sense that it may be used to any profitable extent for commercial purposes. It was, however, declared a navigable stream in law by the act of 1840, and, so far as the rights of the public were concerned, it was recognized as such by our Supreme Court in the case of *Parker v. The People*, *supra*, where it is declared that "after the passage of that act Parker maintained his dam as an obstruction to a navigable river, and in violation of that law, because by the passage of that act it became public in its use, and its use was under the control of the legislature." As by the act of 1840 the Fox river had become public in its use, the general public could not afterward be prohibited or curtailed in the use of the waters of the same by private owners of riparian rights who desired to make use of the same for their pecuniary gain, in propelling machinery.

In the case of *Evans v. Merriweather*, 3 Scam. 494, it was said, respecting the wants of man in regard to water, in a case relating to the right to use the water in a stream :

"These wants are either natural or artificial : natural are such as are absolutely necessary to be supplied in order to his existence; artificial, such only as, by supplying them, his comfort and prosperity are increased. To quench thirst, and for household purposes, water is absolutely indispensable. In civilized life, water for cattle is also necessary. These wants must be supplied or both man and beast will perish. The supply of man's artificial wants is not essential to his existence; it is not indispensable; he could live if water was not employed in irrigating lands or in propelling his machinery."

In the case of *City of Auburn v. Union Water Power Co.*, 90 Me. 576, it is said :

"Health is of more importance than wealth, and cleanliness is next to godliness; and we hold that the right of the

people to an abundant supply of pure water, by which their health and cleanliness may be secured, is paramount to the right of mill owners to have the water for propelling their machinery, and that to the extent that the two rights conflict, the latter must yield."

We are therefore of opinion that the right of the public residing along Fox river to take water out of the same for domestic, sanitary and fire purposes, is paramount to the right of the owners of said water power to use the same for the purpose of propelling the machinery of their mills. For the reasons above stated, the judgment of the court below will be reversed.

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**Wm. A. McGillis v. James Hogan, John S. Cooper and A. W. Eames.**

1. **EQUITY PRACTICE—Cross-bill, When Not Necessary.**—A formal cross-bill is not necessary to enable a defendant to obtain payment of a claim due him and arising out of the subject-matter in litigation.

2. **SAME—Answer Not to be Treated as a Cross-bill.**—A mere answer can not be treated as a cross-bill in equity by simply requesting that it be so treated, even if it sets up some affirmative right in the defendant.

3. **SAME—When a Cause Should Be Referred to a Master, for an Accounting.**—The court discusses the question as to when a cause must go to a master for an accounting.

4. **SAME—When Not Error to Refuse Relief Under a Cross-bill.**—It is not error to refuse relief under a cross-bill, if a party necessary to such relief, though a party to the original bill, is not made a party to the cross-bill.

5. **SAME—What is to be Considered as an Abandonment of a Cross-bill.**—Where an answer asks that it be taken as a cross-bill, but does not pray for an answer to such cross-bill, and no rule is entered to answer it as a cross-bill, it is abandoned as a cross-bill.

6. **SAME—When a Trustee is Entitled to Compensation as an Attorney.**—Under a contract with an attorney making him a trustee and authorizing him to deduct from the proceeds of intended litigation, the reasonable fees thereof, if the trustee, with the assent of the parties, conducts the litigation as their attorney, he will be entitled to deduct from the proceeds reasonable compensation for his legal services.

7. **LIMITATIONS—No Application to Trusts.**—The statute of limitations has no application to a case involving a direct trust between the *cestui que trust* and the trustee, cognizable only in a court of equity.

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**Bill to Close a Trust.**—Error to the Circuit Court of Kankakee County; the Hon. JOHN SMALL, Judge, presiding. Heard in this court at the May term, 1899. Affirmed in part, reversed in part and remanded with directions. Opinion filed October 12, 1899.

PADDOCK & COOPER, attorneys for plaintiff in error.

WILBER, ELDRIDGE & ALDEN, attorneys for defendant in error A. W. Eames.

H. K. WHEELER, attorney for defendant in error John S. Cooper.

MR. JUSTICE DIBELL delivered the opinion of the court.

This was a bill in equity filed by John S. Cooper in the Circuit Court of Kankakee County to close a trust and for other relief, to which bill William A. McGillis, James Hogan and A. W. Eames were defendants. The defendants severally answered, and Eames filed a cross-bill against Cooper and McGillis, which was answered.

There was a hearing, and a decree in favor of complainants and cross-complainant, from which McGillis prosecutes this writ of error. Eames assigns cross-errors.

In 1882 McGillis, a resident of Kankakee, Illinois, and Hogan, a resident of Ashland, Massachusetts, became partners under the name McGillis & Co., and said firm on September 6, 1882, entered into a written contract with the Western Air Line Construction Co., an Iowa corporation, by which McGillis & Co. undertook to grade and complete forty-six miles of the roadbed of the Indiana, Illinois and Iowa railroad, at certain prices therein named. The measurements and decisions of the engineers of the Construction Co. were made conclusive upon the parties. Provision was made that the Construction Co. might complete the work at the expense of McGillis & Co., after notice to that firm, if the engineer had just apprehension McGillis & Co. would not complete it within the time limited. Performance by McGillis & Co. was secured by a bond for \$20,000. After McGillis & Co. had done part of the work and received certain payments they abandoned the work, alleging as an

excuse that the engineer of the Construction Co. had fraudulently given too low estimates upon the work they had done, by which they were deprived of \$35,000 due them for work done. About that time Hogan lost a large sum of firm money in gambling houses in Chicago. The firm employed John S. Cooper, a Chicago lawyer, and he recovered a part of it for them. The Construction Co. served notice upon McGillis & Co., as provided by the contract, that it would complete the work at the expense of McGillis & Co., and it did thereafter complete the work at an expense, as it claimed, of \$22,000 in excess of the amount it would have cost the Construction Co. under the contract with McGillis & Co. McGillis & Co. had no moneys with which to prosecute a suit against the Construction Co., and the latter had no tangible property in this State, except its interest in said road-bed and superstructure placed thereon. McGillis & Co. were indebted to many parties for work and material furnished them for use upon the contract. An agreement was made between the firm and Cooper, their attorney, by which McGillis, the first party, and Hogan, the second party, executed an instrument assigning to Cooper, the third party, as trustee, all their rights under said contract. Cooper accepted the trust in writing. The instrument gave Cooper full control of the controversy between McGillis & Co. and the Construction Co., authorized him to sue upon their claim, and to settle and compromise all said matters, and to bind McGillis & Co. in relation thereto. The instrument imposed upon Cooper the following directions as to the disposition of the funds when collected :

“First: Out of any moneys or funds derived from a settlement or a decree or judgment relating to the matters in controversy, that is to say out of any moneys or funds derived for work done or materials furnished or damages incurred by said first and second parties on the line of the Indiana, Illinois and Iowa railroad, the said Cooper as such trustee shall pay and deduct the reasonable costs, fees and expenses of such settlement or litigation. Second: He shall next pay the amount due by said first and second parties for work done or materials furnished on the line of

said railroad by other persons, as the same is shown upon the books and papers of said firm composed of said first and second parties hereinbefore referred to. Third: He shall divide the remainder of such money or funds so derived, between the said first and second parties hereto, in accordance with the interest that each have in said copartnership, the same being an equal interest, but the partnership accounts between said first and second parties not having yet been settled."

Thereafter Cooper brought an attachment suit in the Circuit Court of Kankakee County against the Construction Co. upon said claim. Defendant procured the removal of the cause to the United States Circuit Court. A trial was had in Chicago before Judge Bunn and a jury, occupying some ten days, and resulting in a verdict for plaintiffs for about \$17,000. A motion for a new trial was made by the defendant, and argued at Madison, Wisconsin, and granted upon defendant paying the costs and \$500 to plaintiffs. A second trial of about eight days' length was had before Judge Gresham and a jury, and plaintiffs had a verdict for \$24,165.57. A motion for a new trial was argued and denied, and judgment rendered. A writ of error to the Supreme Court of the United States was sued out and made a supersedeas. Upon application to that court the supersedeas was set aside, but the writ of error was retained. John Allison & Co., creditors of McGillis & Co., sued the latter and got judgment. That matter was then adjusted by consent of McGillis & Co. by the assignment to Allison & Co. of \$8,800 of said judgment against the Construction Co. Thereafter Cooper settled with the Construction Co. for \$20,000 in cash, he first agreeing that the fees of himself and his assistant, Gen. Stiles, should be scaled down seventeen per cent and also procuring Allison & Co. to accept \$7,900 in full of their judgment.

In all this litigation Cooper acted as the main attorney for McGillis & Co., assisted at the trial by Gen. Stiles and some younger lawyers. The Construction Co. was represented by able lawyers, led at the first trial by W. C. Goudy and at the second by Edwin Walker. The litigation was expensive for plaintiffs. It was a matter of great diffi.

culty to prove their case. The grading had been done upon an old road-bed constructed eleven years before McGillis & Co. began work. After McGillis & Co. quit, the Construction Co. at once went on and finished the work. The Construction Co.'s engineer in making estimates for McGillis & Co. had assumed that the original roadbed was a complete and perfect structure of a certain height and length. McGillis & Co. claimed it was washed out and destroyed in many places, which they had filled and for which they should be paid. It was a matter of much difficulty and expense, and required the aid of experienced civil engineers, to ascertain and prove how much McGillis & Co. had done upon this road-bed, finished as it was before the first trial, and containing the work of three different sets of contractors; and especially to overcome the estimates made while McGillis & Co. were at work by the engineers of the Construction Co., whose decisions were by the contract made final. Money was therefore called for by Cooper frequently and in large sums. When Hogan went into the firm he borrowed considerable sums of money of A. W. Eames of Ashland, Mass., which Hogan claims he put into the firm business. When Hogan was called upon to advance funds for the prosecution of the suit against the Construction Co. he was unable to do so. He thereupon assigned his interest in the contract and suit to Eames, and the latter advanced money, mainly for the first trial. He paid \$1,700 directly to Cooper, and paid \$410 at the request of Cooper to procure the attendance of Hogan and his brother, who were unable or unwilling to come to the trial unless their expenses were paid. He thus advanced \$2,110. McGillis advanced over \$4,000, mostly for the expenses of the second trial. McGillis also paid claims against McGillis & Co. for labor and material to the amount of \$2,696.35, prior to the settlement with the Construction Co.

After Cooper received the \$20,000 he distributed it on December 10, 1888. At that time he paid the remaining expenses of the suit (except certain amounts aggregating \$392, which he forgot, and has since paid out of his own moneys); paid Allison & Co. \$7,900 in full of their judg-



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ment against McGillis & Co.; paid Gen. Stiles the balance due him for his services at the trials; deducted the balance he claimed to be due himself for his legal services; and paid McGillis \$6,696.35, which left of the \$20,000 only \$7.65, and that sum Cooper retained. He took at that time from McGillis a paper, signed by McGillis, the body of which was as follows:

“Received of John S. Cooper, trustee, the sum of \$2,696.35, money paid out by me in payment of the indebtedness of McGillis & Company, incurred in the work of construction of Indiana, Illinois & Iowa R. R. under a contract with the Western Air Line Construction Company. Also received at the same time from John S. Cooper, trustee, the sum of \$4,000 with which to pay the remaining debts of said McGillis & Co., which I agree to devote to such purposes, rendering an account to said Cooper of my actings and doings whenever so requested.”

The proof shows that McGillis thereafter expended more than \$4,000 in payment of the remaining debts of McGillis & Co. The firm of McGillis & Co. was organized to take this contract from the Construction Co., and the firm never did any other business.

After Eames had advanced the \$2,110 he made an assignment under the insolvent laws of Massachusetts, and thereafter purchased from his assignee all interest in this matter, and then began to demand from Cooper payment both of the \$2,110 so advanced and also of the moneys he had originally loaned Hogan. Cooper then began this suit on September 9, 1895, to enjoin Eames from suing him, to compel McGillis to account for the \$4,000 paid him December 10, 1888, to compel McGillis and Eames to settle between themselves the matter of Eames' advances, and to have the trust declared closed. In the final decree the court below discharged Cooper, declared the trust closed, and gave Eames a personal decree against both McGillis and Hogan for \$3,131.10, being said \$2,110 advanced by Eames, with interest thereon from December 10, 1888, the date when McGillis received the \$4,000.

Should the decree be reversed because the master did not state an account between the parties? To answer this we

must inquire, first, whether any of the parties can now be heard to complain of said omission, and if not, then, second, whether the accounts to be investigated here are so complicated that the court will of its own motion refuse to consider them without such statement. Eames and Cooper each argue here that no statement of account by the master was necessary. There is therefore no error committed against them. McGillis' only assignment of error on the subject is, "the court erred in not referring the case to a master in chancery to state an account." The record before us contains an order entered February 20, 1896, referring the cause to the master to take the proofs, and another order entered the next day directing "that said master in chancery state accounts between all the parties, and that depositions taken may be opened before the master and evidence considered by him." The court therefore did the very thing which the assignment of error complains it did not do. The assignment is therefore not sustained by the record. It is not assigned for error that the master failed to obey said direction, nor that the court proceeded to a final hearing without waiting for the account to be stated. The court below was not asked to defer the hearing till such account was stated. Clearly McGillis is not in a position to complain that error was committed in not awaiting a statement of the accounts between the parties.

Is the case in such a condition that this court should refuse to decide it, but should of its own motion send it back for an accounting before the master? If the case requires a settlement either of all the accounts of Cooper as trustee, or of all the firm accounts of McGillis & Co., then such a statement of account by the master was an indispensable step to be taken before any final decree could be rendered, and the court will of its own motion require that action to be taken. If those matters are not open to consideration and settlement in this case, then we are of opinion no reference was necessary, for reasons appearing further on. An examination of the original bill shows its object was to compel Eames to look to the fund of \$6,696.85 Cooper had paid McGillis for repayment of his advances,

and to discharge Cooper from further liability. The cross-bill of Eames claimed that out of the \$20,000 Cooper was equitably bound to pay Eames, and that McGillis was also equitably bound to pay Eames out of the \$6,696.85 McGillis received from Cooper, and it sought to enforce such payment. Neither of these bills sought a revision of Cooper's accounts and acts as trustee from the beginning. Eames did not ask a general settlement of the accounts of McGillis & Co. The answer of McGillis to the original bill concluded as follows:

"And this defendant by way of cross-bill to the said bill of complaint alleges that said complainant is indebted to the firm of McGillis & Hogan to the amount of \$10,000, for which he should account and pay over to said firm, and that he is indebted to this defendant in the further sum of \$2,000, for which he should account and pay over. And this defendant by way of cross-bill prays the court for accounting as to said Cooper, as trustee, and that he may be decreed to pay over to said McGillis & Hogan and to said McGillis such sum or sums as on accounting may be due from him."

McGillis concluded his amendment to said answer as follows:

"And by way of cross-bill to the said original bill this defendant prays that said Cooper may be called upon to account for all moneys which he has retained for counsel fees which he has paid to Stiles and Starrin, as set forth in the said bill of complaint, and that a money decree may be had against him, the said Cooper, for whatever sum may be found due to the firm of McGillis & Hogan."

It will be observed that these prayers do not specifically name any one as defendant to the supposed cross-bill, and if they can be construed as naming Cooper as a defendant, they do not ask that he answer, nor is there after the answer any new matter stated as a basis for the relief prayed, so as to bring the case within the exceptional rule announced in *Thielman v. Carr*, 75 Ill. 385, which was a suit to establish a mechanic's lien, in which class of cases the court held a formal cross-bill not necessary to enable a defendant to obtain payment of his claim in its due order. In *Purdy v. Henslee*, 97 Ill. 389, the authorities are

reviewed and the established practice is adhered to, that a mere answer can not be treated as a cross-bill by simply a request that it be so treated, even if it sets up some affirmative right in defendant. It is there held (and also in *Blatchford v. Blanchard*, 160 Ill. 115), that even under *Thielman v. Carr*, *supra*, the matter of the cross-bill must be sufficiently stated to constitute a cross-bill if detached from the answer; and McGillis did not comply with that requirement. But if McGillis' answer could be considered a cross-bill, no answer to it was asked, and as a cross-bill it was abandoned. (*Purdy v. Henslee*, *supra*; *Hungate v. Reynolds*, 72 Ill. 425; *Parke v. Brown*, 12 Ill. App. 291.) Again, if this supposed cross-bill had any defendant it could only be Cooper, named in the prayers above noted. But no accounting of the kind now in question could be had under said supposed cross-bill without Hogan and Eames being defendants thereto, as they had an interest in such an accounting. McGillis therefore had no pleading which entitled him to an account of the receipts and disbursements of Cooper prior to the payment of said \$6,696.85 to McGillis nor to an account of the receipts and disbursements of McGillis & Co. Even if the pleadings had made a case for an accounting by the trustee it would have been proper for the court to hear preliminary proofs first, to determine whether an accounting ought to be had and upon what basis. The court did hear proof from which it was justified in finding that in November, 1896, Eames and McGillis, at Cooper's office in Chicago, went over his accounts thoroughly, and discussed and were satisfied with each item thereof, and then gave him their joint note for \$1,000 upon the deficiency. True, Eames and McGillis deny such an examination of the accounts, but when the reasonable probabilities are added to the testimony of Cooper and Clark and to the memoranda then made by Clark, the court below was warranted in believing there was then a settlement. On December 10, 1898, it is clear McGillis was fully advised how the moneys had been and were being applied, and he acquiesced therein and was a party thereto. The transactions of that date constituted a settlement as between

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Cooper and McGillis, and were binding upon McGillis. The only matter not then closed as between McGillis and Cooper was the disposition to be made of the \$6,696.85 paid by Cooper to McGillis that day. Therefore the preliminary proofs warranted the court in not going into any question of accounting by the trustee or between the partners and Eames. No accounting was necessary to ascertain what Eames advanced for the expenses of the suit, for there were but six items, and their amounts and dates when advanced were not disputed. McGillis' testimony showing to whom he paid remaining debts of McGillis & Co., amounting to more than \$4,000, is also undisputed. No reference to state an account was therefore required.

Further, the only object for which McGillis now urges the reference is to avoid the charges of Cooper for his professional services. It is argued, first, that he could have no compensation as trustee under the trust instrument; second, that he made a verbal contract to do the work for \$2,500, or ten per cent of the sum collected; and third, that his charges were excessive. Cooper was the attorney of McGillis & Co. before this contract. It was as their attorney he devised this arrangement. Not only did he perform the main labor of preparing and trying the case, but it is obvious the parties so intended when the contract was made. If he was only to pay others, the word "deduct," in the first clause of the contract above quoted, relative to the application of the proceeds of the suit, was inapplicable. It said, "the said Cooper \* \* \* shall \* \* \* deduct the reasonable \* \* \* fees \* \* \* of such settlement or litigation." Construing the contract by the situation of the parties, and by their subsequent acts, we think they meant by these words that Cooper should take out of the fund reasonable compensation for his legal services. McGillis and Hogan testify he told them his charges would be \$2,500, or ten per cent. This negatives the present claim that he was to serve for nothing. Cooper denies that conversation. If it occurred at all it was before the trust instrument was drawn, and was therefore superseded by its provision for reasonable fees. Cooper's charges appear

very heavy. But the litigation was important; the labor of making a case for plaintiff was great; the trials were in the United States Circuit Court at Chicago, with services at Madison, Wis., and at Washington. Able lawyers were on the other side. The litigation continued six years. The result was an evident success, where defeat and a large liability upon the bond given by McGillis & Co., with its contract, were entirely possible. Cooper introduced proof that his charges were reasonable for the services performed. There was no evidence to the contrary. The parties never questioned the sums charged by him for his services while they were being rendered, nor for seven years thereafter, and evidently McGillis would not have done so then had not Eames pressed his claim for reimbursement of his advances. We think the present record would not justify us in reducing Cooper's charges or directing him to now account concerning them before a master.

Eames argues he should have been given a decree against both McGillis and Cooper for the sums he originally loaned Hogan. We think it clear, even from the testimony of Eames himself, when it is all considered, that the loan was not to McGillis & Co. but to Hogan, personally, to furnish him capital to put into the firm. But in either case the court below properly refused a decree therefor here. If the loan was to Hogan it would only be recoverable out of his interest in the firm after all firm debts were paid; and the assets are not sufficient to pay the firm debts, and there is no surplus for the partners. If the loan was to McGillis & Co. it is not one of those debts "for work done or materials furnished on the line of said railroad," which Cooper was to pay under the second clause of the trust instrument above quoted, giving directions as to the application of the trust fund. It was, therefore, not a debt payable in terms out of said fund, and Cooper is not chargeable with any duty concerning it. There is no fund in court out of which it is payable. It can not be recovered here against the firm of McGillis & Co. because (if for no other reason) Eames did not see fit to make Hogan, one of the partners liable for the debts of the firm, a defendant to

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his cross-bill. If he was seeking to enforce in this proceeding a mere legal demand against McGillis & Co., both partners should have been defendants to his cross-suit. Moreover, if it was a mere loan to McGillis & Co., wholly unconnected with the trust matters involved in this suit, the statute of limitations, set up in McGillis' answer, seems to be a complete defense.

Cooper only paid out of the fund the costs and expenses he had personally incurred. The first direction of the trust instrument as to the distribution of the fund was that he should pay the costs, fees and expenses of such litigation. The moneys advanced by Eames and McGillis to defray those expenses were, in our judgment, as much payable under that clause as they would have been if Cooper had advanced his own money or borrowed funds at the bank to defray the expenses of the suit. It was a matter of indifference to McGillis whether the money he advanced for expenses was refunded to him or the same amount applied in liquidation of the debts of the firm, as he was liable for said debts; and it is not important whether McGillis is correct in testifying, the receipt he gave does not truly state for what the money was paid him. But Eames was not liable for the debts of McGillis & Co., and therefore it was important to him that the \$2,110 he advanced should be repaid to him in the order provided in said trust instrument and out of said trust funds. He had rights under said instrument by virtue of the assignment from Hogan to himself after the trust instrument was executed. He had a right to make advances to protect the interests Hogan had assigned to him. The proof shows Eames advanced these moneys from time to time upon Cooper's repeated written promises to repay them out of the first moneys he should receive as the fruits of the litigation, with interest at six per cent. One of these promises was as follows:

"All moneys advanced by you shall be paid first out of the moneys collected, with six per cent interest from the date of advancement to the date of payment."

In another letter Cooper wrote Eames for a statement "of all moneys you have advanced to me since I received

the assignment of the claim and the dates of such advances, as they will bear interest at six per cent from the time the advance was made, as I promised you." There are other like letters, and the proof also shows an oral agreement to the same effect. Cooper had to raise money for necessary expenses of the litigation, and we are satisfied he had authority to bind the firm and fund for its repayment with interest. It was Cooper's duty to repay Eames. He recognized this duty in his testimony, but excused his turning the entire balance of the fund over to McGillis without paying Eames as he had agreed, by testifying McGillis had agreed to do it for him out of said funds. But his testimony as to what McGillis said shows he wronged Eames in trusting McGillis to pay Eames. He testified McGillis said he was satisfied Eames was a partner of Hogan, and that Hogan had gambled away the last payment made by the Construction Co., and that Eames and Hogan owed him money and he wanted to settle with Eames. If McGillis said that, it should have showed Cooper he did not intend to pay Eames, and Cooper should have himself carried out the first provision of the trust instrument and performed his own promises. McGillis denies this conversation, but admits in his testimony (not sufficiently abstracted) that about the time of the settlement he and Cooper had a long conversation about Eames, and admits that before the settlement he was fully acquainted with the fact Eames had made these advances upon promises by Cooper of repayment out of the judgment that should be obtained. McGillis therefore received the \$6,696.35 with knowledge that Eames was entitled to have his advances repaid out of that fund, both under the first provision of the trust instrument, and under the promises made Eames by Cooper in harmony therewith. He therefore took the fund charged with that trust in favor of Eames, and the statute of limitations is not a defense. If there was not enough of the fund to repay all advances for expenses made by both Eames and McGillis, Eames should have been paid first, for he was not liable for the firm debts or for the costs of the litigation, while McGillis was liable for both. The decree



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in favor of Eames against McGillis was therefore right, except that it should have further given Eames interest at six per cent per annum on the several sums advanced from the dates of their advancement to the date of the decree. The decree should also be against Cooper for the same amount, with execution against both. The present decree in favor of Eames is also against Hogan. This is error, because Hogan is not a defendant to Eames' cross-bill. He has not assigned error and the fact would not be here noticed if it were not necessary to direct a larger decree; but it is obvious that in entering another and larger decree for Eames it can not be against Hogan, because Eames did not make him a defendant or pray relief against him. The decree should provide that if Cooper is compelled to pay anything thereunder to Eames he shall be entitled to a supplementary decree against McGillis and Hogan for the repayment thereof, with execution.

The decree is reversed so far as it is above disapproved, and it is in all other respects affirmed; and the cause is remanded to the court below with directions to modify its decree in conformity with this opinion. McGillis and Cooper will each be required to pay one-half the costs of this court.

### Otis L. Thisler v. Archibald W. Hopkins.

1. IMPLIED WARRANTY—*Where a Contract Expresses the Conditions of a Sale.*—Where a contract in writing expresses the conditions of a sale, a warranty not included therein can not be implied.

2. NEW TRIALS—*To Enable a Party to Recover Nominal Damages.*—It is settled doctrine in this State that courts will not reverse a judgment and award a new trial simply to enable a party to recover nominal damages.

**Assumpsit**, upon a written stipulation of the facts. Trial in the Circuit Court of Putnam County; the Hon. THOMAS M. SHAW, Judge, presiding. Finding and judgment for defendant; appeal by plaintiff. Heard in this Court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

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94	*664
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111	*335

FRED T. BEERS, attorney for appellant.

A vendee may treat a warranty of quality as a condition subsequent, and upon discovery of its breach, rescind the contract or treat it as at an end and recover the price paid by him. *Dorr v. Fisher*, 1 Cush. (Mass.) 274.

And the vendee may return the thing without unwarrantable delay, and this will rescind the sale and he may recover the price if he has paid it. 1 Parsons on Cont. 592.

And where a general warranty is relied upon it is not necessary in the pleading to state if it is express or implied. *Hoe v. Sanborn*, 21 N. Y. 552 78; Am. Dec. 163.

WINSLOW EVANS, attorney for appellee.

The written contract set out in the stipulation alone expresses the contract of the parties as to the sale of the jack "Fortune," and no warranty as to the quality or condition of the jack, not included therein, can be implied. *Robinson v. McNeill*, 51 Ill. 225; *Van Ostrand v. Reed*, 1 Wend. (N. Y.) 424; *DeWitt v. Barry*, 134 U. S. 306; *Seitz v. Brewers Refrigerating Co.*, 141 U. S. 510; *Titley et al. v. Enterprise Stone Co.*, 127 Ill. 457.

The burden was on the plaintiff to show that the jack proved barren on two seasons' trial, and that after such trial he had been returned to the stables of Hopkins in good health and condition, and that after the performance of these conditions, Hopkins had refused to furnish him another good jack or what such "good jack" at such time and place was reasonably worth in the market. 1 Greenleaf on Evidence, Sec. 74; *Sutherland on Damages*, Secs. 438-441.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was an action of assumpsit, tried by the court below upon a written stipulation of facts, a jury having been waived.

The court found the issues for appellee (defendant below) and rendered judgment against appellant in bar of

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the action and for costs, and he brings the cause to this court.

The controversy arises out of a transaction between the parties, wherein appellee sold to appellant a male animal, commonly called a "jack," for breeding purposes, at the same time delivering to appellant a bill of sale of which the following is a copy:

"BILL OF SALE.

Know all men by these presents, that I, A. W. Hopkins, of Granville, Ill., have this day sold to O. L. Thisler, of Chapman, Kansas, Fortune, the two-year-old black jack, white points, for and in consideration of \$600, the receipt whereof is hereby acknowledged. In case the above jack proves barren, with careful handling, upon two seasons' trial, on the return of said jack to my stable in good health and condition I agree to furnish the purchaser with another good jack. In witness whereof I have hereunto set my hand and seal this 31st day of December, 1892.

A. W. HOPKINS. (SEAL.)

It appears from the stipulation that appellant gave his note for the purchase price of the jack and has since paid the same; that the animal was delivered to appellant and by him taken to his farm in Dickinson county, Kansas, and that within a few days thereafter he was sold by appellant to a third party residing within one hundred miles of appellant's farm; that the last mentioned purchaser kept the jack for breeding purposes during the season of 1893, and used all reasonable care required by such animals kept for breeding purposes, and that the jack would serve but ten mares during the season, and refused to serve more, and got five or six mares with foal; that the owner tried to use said jack for breeding purposes during the season of 1894, but that he refused to serve mares during that season, and that thereupon, in accordance with the contract between them, the purchaser from appellant returned the jack to the latter; that appellant then tried to use the animal for breeding purposes, but he still refused to serve mares, and appellant thereupon wrote to appellee stating the above facts, and appellee replied that the refusal of "Fortune" to serve mares was but a temporary affair, owing to his youth; that

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appellant again wrote to appellee stating the facts in regard to the jack, and requesting him to take back the animal and refund the \$600 paid for him. In reply appellee sent a letter, of which the following is a copy :

“PERU, ILL., April 13, 1894.

O. L. THISLER.

DEAR SIR: I agreed to furnish you another jack if the jack sold was barren. This agreement is not assignable by you to any one so as to obligate me. I will not consider the question of taking him back.

Yours truly,

A. W. HOPKINS.”

Thereupon appellant shipped the jack to appellee, who refused to receive him as returned under the contract, but allowed appellant to leave him there as the property of the latter and at appellant's risk. The animal stayed at the farm of appellee for several weeks, and, with the aid of a “jenny,” was used for breeding purposes, and served eleven mares between May 10, 1894, and the latter part of July, 1894, when appellee shipped him back to Kansas, to appellant. It is stipulated that appellant paid in all \$112 transportation charges in shipping the jack to Illinois and back to Kansas; that appellant has retained the animal at his farm in Kansas ever since his return thereto, where he has been unable, and has refused to perform any service with mares, and has not got any foals. It is further stipulated that shortly after the jack was delivered to appellant at his farm in Kansas, there was a great depression in the markets of the United States generally of all animals held and used for breeding purposes, and particularly was this true of jacks; and that the jack in question, if a good foal getter, to-day would not be worth, and is not worth, more than the sum of \$100.

The question for us to determine is, whether, upon the facts stated in the stipulation, appellant is entitled to recover. Appellant's contention is that he is entitled to recover, as upon an implied warranty of the jack, not only the \$600 paid therefor but also the \$112 paid for transportation charges, as damages. We think the bill of sale must be held

to constitute the contract between the parties, and that in the face of the written instrument there was no implied warranty. The extent of appellee's liability under the contract was, that if the jack sold should prove barren after a fair trial for two seasons, then on his return to appellee's stable in Putnam county in good health and condition he would furnish appellant another good jack. It can not be said the jack proved entirely barren, because the stipulation shows he got five or six mares with foal the first season and served eleven mares the second season, the result of which does not appear; and while his procreative powers do not seem to have been as strong as perhaps appellant was led to expect, yet the jack certainly was not barren. Before appellant had any opportunity of testing the animal's powers for breeding purposes, he sold him to a third person; but as to what he got for him, or what, if anything, he paid back to the purchaser when the jack was returned, the stipulation does not show. We are of the opinion the return of the jack to appellee before the end of the second season was premature, and appellee was not bound to receive him. Had the jack proven barren, the contract required his return to the stable of appellee in good health and condition. We think the mere putting the animal on board the cars in Kansas and shipping him to appellee was not a compliance with that condition. But, since July 18, 1894, the jack has been in the possession of appellant, on his farm in Kansas; and while it is contended he is in a condition as if tendered May 10, 1894, we can not so regard it. According to the stipulation, May 10th would be in the middle of the breeding season in Kansas, which, as we have said, was too soon to make a tender of the jack under the contract; and since he was returned to Kansas there has been no attempt to deliver the animal at appellee's stable in Putnam county.

If appellant were entitled to recover at all, it would only be the value of another good jack, and there is no proof in the record as to what another good jack was or would be worth.

True, it is stipulated that if the jack "Fortune" were a

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good foal getter he would not be worth more than \$100, but we think that is hardly sufficient to show the value of another good jack.

Counsel for appellant himself, in his reply brief, says that this clause of the stipulation is meaningless and has no bearing on the issues of the case, and in this connection we are disposed so to regard it.

Notwithstanding the omission of proof as to the value of another good jack, still, if a breach of the contract were clearly shown, it might entitle the plaintiff to nominal damages; but it is settled doctrine in this State that courts will not reverse a judgment and award a new trial simply to enable a party to recover nominal damages. (Comstock v. Brosseau et al., 65 Ill. 39.)

We think there was no error in the rulings of the court on propositions of law, and the judgment must be affirmed.

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### Robert T. Harrington, for use, etc., v. The First National Bank of Marseilles et al.

1. CHECKS—*As Assignments of Funds in Bank—Garnishment.*—A check drawn upon a bank by a depositor operates as an assignment of the amount stated, to the payee thereof, not only of funds then in bank, but also of funds of the drawer received thereafter. If at the time the checks are presented for payment the drawer has funds in the bank to meet them, the holders become entitled to payment, and a subsequent garnishment will not affect such right.

2. GARNISHMENT—*With Notice of a Previous Assignment by Check.*—If a garnishee has notice of the previous assignment of the funds in his hands by check after he is served with process and before he answers or pays out the funds or is subjected to any other liability on account thereof, the assignment by check is protected as against the garnishment.

3. SAME—*Status of the Garnisheeing Creditor.*—A garnisheeing creditor stands in the shoes of his debtor, whose name he must use in the suit, and to whose legal rights as they existed at the time garnishee process was served, he is confined.

4. SAME—*Effect of Drawing a Check.*—A person may draw a check in the reasonable expectation of having funds in bank to meet it when

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presented, and by doing so impliedly contracts with the drawee that funds shall be there to meet it when presented.

5. **BANKS AND BANKING—Rule as to Checks.**—The rule is, that as to the bank on which a check is drawn, there is no appropriation of the fund until the check is presented for payment. Checks actually drawn before garnishee summons is served, though not presented until afterward, are entitled to priority of payment out of the fund on hand when the garnishee summons was served, although the bank had then no knowledge or notice of the checks.

6. **SAME—Where a Check Exceeds the Amount on Deposit.**—A bank is not obliged to make a partial payment upon a check exceeding the fund in bank subject to check, and is entitled to take up the check as evidence for its payment.

7. **NOTICE—Of Holding, etc., Not a Presentation for Payment.**—Written notice and demand with copy of check by the holder can not be treated as a presentation for payment.

**Garnishment.**—Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

CYRUS WALKER RICE and SAMUEL P. HALL, attorneys for appellant.

The general rule established by courts in most of the United States is that a check drawn on a bank does not operate as an assignment or transfer of funds on deposit to the amount of the check, transferring title thereto to the checkholder until the check has been accepted by the bank, and until such acceptance, the holder can not sue the bank. Am. & Eng. Enc. Law (1st Ed.), Vol. 1, page 837; Am. & Eng. Enc. Law (2d Ed.), Vol. 2, page 1065.

The Supreme Court of Illinois, however, have, in regard to checks drawn against sufficient funds, established a different rule, viz.: that such a check transfers to its holder title to the funds of the drawer sufficient to pay it, and that the holder, if he presents the check for payment, and the bank refuses to pay, may recover in his own name the amount of the check from the bank, provided the bank, on presentation, continues to have sufficient of the drawer's funds to pay it; but in all such cases decided by the Illinois Supreme Court in which a check is held to operate as a transfer of title to the fund, the fund itself was in existence

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in the hands of the bank at the time the check was presented. This element enters into the definition of the words "bank check" whenever that expression is used by our Supreme Court as signifying an instrument which passes to the holder title to funds of the drawer. *Bank of America v. Indiana Banking Co.*, 114 Ill. 491; *Bickford v. First Nat. Bank*, 42 Ill. 242; *Munn v. Burch*, 25 Ill. 35.

BUTTERS, CARR & GLEIM, attorneys for appellees.

Notice to garnishee, before answer, but after the proceeding is begun, of the assignment of claim of his creditor made anterior to the garnishment proceeding, is sufficient to protect rights of assignee. *Knight v. Griffey*, for use, etc., 57 Ill. App. 583, 161 Ill. 85; *Nat. Bank of America v. Indiana Bank. Co.*, 114 Ill. 486.

A bank check in this State transfers the money of the drawer in the bank to the drawee the moment the check is delivered, and from that moment it ceases to be the property of the drawer, and belongs to the drawee or his assignee. *McAllister v. Oberne et al.*, 42 Ill. App. 287; *Munn et al. v. Burch et al.*, 25 Ill. 35.

Between a garnisheeing creditor and interpleader, any transaction not tainted by fraud and fact, which gives to the interpleader, as against the original debtor, the fund in question, is good against the garnisheeing creditor. *Harlev et al.*, for use, v. *Harlev*, 67 Ill. App. 139; *Hutmacher v. The A. B. Brewing Co.*, 71 Ill. App. 154.

MR. JUSTICE DIBELL delivered the opinion of the court.

Robert T. Harrington drew and delivered two checks upon the First National Bank of Marseilles; one to John Naughton for \$284.70, dated September 28, 1897, and one to J. F. Trumbo, for \$202.87, dated September 29, 1897. Each was presented to the bank for payment about two days after its date, and payment was refused for want of funds, and the holders took them away. On October 18, Trumbo brought his check back to the bank and left it with the cashier, duly indorsed by Trumbo, and it remained



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there till nine days after the bank was served with garnishee process in this case, when the cashier returned the check to Trumbo by mail. After the checks were first presented the bank received several sums to the credit of Harrington, which, after repaying an overdraft, left in the bank to his credit \$393.15. Cyrus R. Rice recovered a judgment for \$6,000 against Harrington in the Circuit Court of La Salle County, and had execution issued thereon, and it was returned *nulla bona*. On November 2, 1897, he began this suit in garnishment against the bank, and had service on the bank that day. Shortly thereafter Naughton and Trumbo each served upon the bank a written notice, with copy of check attached, notifying the bank of the issue of the check; that it had been presented for payment and payment refused; that he still held the check; that it was still unpaid (except that Naughton's notice said \$50 had been paid on his check), and that he proposed to hold the bank responsible for the payment of the check out of any moneys of said Harrington which had been deposited or come into the possession of the bank, "which are, by virtue of said check, due to me." After receipt of said notices the bank answered the interrogatories filed by Rice and set up all the facts above stated. Naughton and Trumbo appeared as claimants of the fund, as allowed by statute, and filed interpleas, setting up their title to the fund by virtue of said checks. There were other matters and other parties before the court, not involved in this appeal. A jury was waived and the proofs heard. All parties stipulated that a certain check, held by Gaylord States, for \$24.50, should first be paid out of the fund in the bank. Naughton and Trumbo stipulated to share *pro rata* the remainder of the funds in the bank and to surrender their checks to the bank. The court held the rights of Naughton and Trumbo paramount to those of Rice, and that upon surrender of their checks to the bank they were entitled to the remainder of the money in the bank to the credit of Harrington after payment of the check to States. Judgment was entered accordingly, and Rice, the garnisheeing creditor, prosecutes this appeal.

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These checks operated as an assignment to the payees thereof, not only of funds then in bank but also of funds of the drawer, which might thereafter be received. If at any time, when they were presented for payment, the drawer had funds in the bank to meet them, the holders of the checks became entitled to payment. (*Gage Hotel Co. v. Union National Bank*, 171 Ill. 531.)

Garnishment will not cut off a previous assignment of a fund. If the garnishee has notice of the previous assignment, after he is served with process and before he answers or pays out the funds, or is subjected to any other liability on account thereof, the assignment is protected against the garnishment. This is so because the garnisheeing creditor stands in the shoes of his debtor, whose name he must use in the suit, and to whose legal rights, as they existed at the time garnishee process was served, he is confined. (*Knight v. Griffey*, 161 Ill. 85; *Bank of America v. Indiana Banking Co.*, 114 Ill. 483; *Price v. German Exchange Bank*, 60 Ill. App. 418.)

Under these principles the first of these checks presented for payment after the funds came into the bank was entitled to be paid in full. On October 18th, Trumbo brought his check back to the bank and indorsed it in blank and left it with the cashier. The special reason for so doing was that it was hoped that through a judgment the bank had against certain grain in an elevator the bank might recover sufficient, more than its own claim against Harrington, to also pay this check. Trumbo testified he empowered the cashier, as his attorney, to collect the check in case the bank did recover such a surplus. This obviously meant he should collect and the bank should pay the check if the bank from that source received a sufficient sum to the credit of Harrington in excess of the bank's claim. In other words, the check was left with the cashier to be paid if a certain credit in favor of Harrington came into the bank. The evidence of the cashier shows that the fund here in dispute, which came into the bank to the credit of Harrington, was the proceeds of the sale of two carloads

of oats sold in Chicago, and credited to the bank by the commission house that sold them, and by the bank credited to Harrington, after deducting its demands, and also the proceeds of the sale of a small amount of corn likewise to the credit of Harrington. We do not find in the evidence anything to show this was not the particular grain the parties had in mind when Trumbo left his check with the cashier. If it was the same, then the Trumbo check was continually present in the bank for payment out of this fund up to and at the time the fund was received; and under the above authorities this worked an assignment of the fund to Trumbo to the amount of his check. But if in fact this was a different fund, we think the presence of the check in the bank in the hands of the cashier when this fund was received, produced the same legal result. The purpose of leaving the check with the cashier was to get payment if at any time thereafter Harrington had a credit there which would pay it. A credit from a particular source was hoped for. This (as we are now assuming) was a credit from a different and unexpected source. While one source of possible credit was in the mind of Trumbo the essential thing he aimed at was to get payment from the bank out of Harrington's account. We think its presence in the hands of the cashier should be treated as a continuous presentation for payment, and as such presentation when and after the credit to Harrington was received by the bank. Under *Gage Hotel Co. v. Union Nat'l Bank*, *supra*, the fund was thereby assigned to Trumbo to the extent of his check.

Naughton's check was not again presented to the bank after its first refusal. The written notice and demand, with copy of check, we can not treat as a presentation for payment, for the check itself was not presented and the bank could not then have paid it, if so disposed. Naughton did not therefore acquire an assignment of the fund by presentation of the check to the bank when it held funds to the credit of Harrington. The remaining question is whether on any grounds Naughton was entitled to the fund as against Rice, the garnisheeing creditor. Harrington could

not defeat Rice by checks drawn after the garnishee summons was served upon the bank; but, subject to that limitation, Rice has no rights in this suit except such as he can work out in the name of Harrington. What was Harrington's contract with Naughton? If, when Harrington gave the check to Naughton, funds had been in the bank to meet it, the drawing would have been, as between Harrington and Naughton, an appropriation of the sum of money named in the check, to lie in the bank till called for. The record does not show whether there were funds then in bank to Harrington's credit or not. The check was issued after banking hours of the day of its date, and Naughton, finding the bank closed, took the check to his home on his farm, over nine miles distant, and was not able to return till two days later, and then there were no funds to meet it. But one may draw a check in the reasonable expectation of having funds in bank to meet it when presented, and by giving this check Harrington contracted that funds should be there to meet it when presented. (*Gage Hotel Co. v. Union Nat'l Bank, supra.*) True, at that time the bank was not privy to such contract, and had at that time no notice thereof, but it was nevertheless a valid contract as between Harrington and Naughton. In *Nat. Bank of America v. Indiana Banking Co.*, 114 Ill. 483, the Bank of America was served with garnishee summons on August 10, 1883, and had funds of the debtors in its hands. On August 11, 1883, two checks were presented drawn by the debtor on August 7th and 8th, respectively, and the bank paid said checks and was held entitled to credit therefor as against the garnisheeing creditor. The rule is that as to the bank on which a check is drawn there is no appropriation of the fund till the check is presented for payment; yet these payments by the Bank of America prevailed over the prior service of garnishee summons upon it. Checks actually drawn before the garnishee summons was served, though not presented till afterward, were held entitled to priority of payment out of the fund on hand when the garnishee summons was served, though the bank had then no knowledge or notice of the checks.

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Harrington v. First Nat. Bank of Marseilles.

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This was because, as between the drawer and the payee, the check was an appropriation of the fund in the bank, and the garnisheeing creditor was bound by what bound the drawer. Here, though funds may not have been on hand when Naughton's check was drawn, and were not on hand at certain times afterward, yet funds were on hand in the bank when the garnishee summons was served, and we see no reason why, in conformity with the rules laid down in the case last cited, if the bank had paid Naughton's check after it was served with garnishee summons, it would not have been equally protected. That check was not again presented to the bank for payment. But before any liability of the bank was fixed in the garnishee suit, and long before issue was joined upon the bank's answer therein, Naughton filed an interplea claiming the fund by virtue of the check. We are of opinion that under the circumstances of this case, this was equivalent to presenting the check for payment, and equally entitles him to protection. Rice can only have what Harrington can recover subject to the limitation we have already stated. Harrington was bound by his contract to have the funds in bank to meet this check. If he had brought this suit against the bank for his own benefit, he could not thereby have avoided his previous contract with Naughton to have funds in the bank to meet his check, and could not by this suit have withdrawn the funds from the bank, as against the check. The form of this suit—garnishment, permits Naughton to set up his rights against Harrington by interplea; and we hold his title to the fund prior and paramount to the rights of the garnishee. The same reasoning would lead to the allowance of Trumbo's claim, even if his check was not continually present for payment while in the hands of the cashier.

All this has been said upon the supposition the fund in bank was sufficient to pay both checks in full. It was not sufficient therefor, and Naughton might have been thereby defeated. A bank is not obliged to make a partial payment upon a check exceeding the fund in bank subject to check. This is a rule for the protection of the bank, which is enti-

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tled to take up the check as evidence of its payment. But if the check-holder will surrender the check for the less amount in the bank, the reason of the rule is satisfied, and the bank is protected. In this case Naughton and Trumbo stipulated to surrender the checks and share the money *pro rata*. Harrington can not object to this, for it is beneficial to him; and if he can not object we think Rice can not.

The judgment is affirmed.

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**Board of Trustees of Schools, for use of, etc., v. James King and David Hannah.**

1. SURETIES—*When Not to be Released by the Extension of the Time of Payment.*—Where the sureties upon a promissory note contract to be bound by an extension of the time of payment, made with the principal debtor without their knowledge, to have such effect the extension must be made upon a sufficient consideration, and of such a character that all parties to the contract will be equally legally bound.

2. PROPOSITIONS OF LAW—*Must be Based upon Evidence.*—Where there is no evidence in the case upon which to base a proposition of law, it is properly refused.

**Assumpsit**, on a school fund note. Appeal from the Circuit Court of Knox County; the Hon. GEORGE W. THOMPSON, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

WILLIAMS, LAWRENCE & WELSH, attorneys for appellant.

J. A. McKENZIE and J. J. WELSH, attorneys for appellees.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

This was an action of assumpsit, commenced January 20, 1899, by appellant, against Cyrus T. King, James King and David Hannah, to recover the amount claimed to be due on four promissory notes, dated March 2, 1885, one being for \$92 and the other three for \$100 each, all due in one year after date, and all bearing interest at the rate of seven per

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cent per annum, payable semi-annually in advance. These notes were all signed by the defendants above named, and were payable to the order of the appellant. Cyrus T. King was the principal debtor, and appellees were mere sureties. Each of said notes contained a clause, as follows, to wit:

“ And we further agree to give such additional security for the payment of these notes, as said trustees may at any time require, and also that no extension of the time of payment, with or without knowledge, by the receipt of interest or otherwise, shall release us or either of us, from the obligation of payment.”

As a defense, appellees, the sureties, pleaded the ten years statute of limitations. Cyrus T. King was defaulted for want of a plea. To the plea of the statute of limitations, the plaintiff replied that the several promises declared upon were each made within ten years last before the commencement of the suit.

While we do not find in the record any formal waiver of a trial by jury, the cause appears to have been tried by the court without a jury, and upon such trial the court entered judgment against the principal, Cyrus T. King, for \$448.78, and found the issue upon the statute of limitations in favor of appellees, and rendered judgment accordingly. The plaintiff below brings the cause to this court by appeal.

This suit having been begun between twelve and thirteen years after the maturity of the notes, the statute of limitations would constitute a complete defense to the action, unless the evidence shows a legal reason why the running of the statute in favor of appellees has been arrested and may not be availed of in their behalf.

We think it clear that when appellees executed the notes, they contracted to be bound by an extension of the time of payment, even though made with the principal debtor without their knowledge; but to have such effect, the extension must have been made upon a sufficient consideration, and of such a character, that all parties to the contract would be equally and legally bound. Appellant seeks to avoid the effect of the statute, by claiming that extensions of time of payment of the notes were given to the principal

debtor from year to year, up to March 2, 1897, and that such extensions bound the sureties. It does not appear that the sureties had any knowledge of these alleged extensions. They insist that the contract contained in the note, in reference to extensions of time of payment, must be construed most strongly against the payee, who is presumed to have exacted the condition, and for whose benefit it was made, and that so construed it authorizes but one extension.

The following cases are cited in support of this contention: *Bank v. Chick*, 64 N. H. 410; *Miller v. Spain*, 41 Ohio St. 376.

But in the view we take of this case it is unnecessary to determine that question. The evidence shows only one payment of interest in advance, and that was made on February 24, 1887, when interest was paid to March 2, 1887. That payment no doubt constituted an extension upon a valid consideration from February 24, 1887, to March 2, 1887. If, as claimed by appellees, the contract authorized but one extension, there was that extension. If, for any reason, the clause in the note was invalid, there was such an extension as released the sureties, it being made without their knowledge or consent. But it will be seen that more than ten years elapsed between March 2, 1887, the time to which payment was extended, and the commencement of this suit, and it follows that even if the extension was legal and binding upon appellees, still the statute of limitations had run and constituted a complete defense when the suit was brought. As to any other alleged extensions, we think the evidence fails to show a single one made upon a sufficient consideration to be binding upon the parties, either the principal or payee of the note. Interest was paid only after it became due. Construing the testimony of the school treasurer most strongly in favor of appellant, all it shows is, that after interest was due the principal would go to the school treasurer every year, and say he would like the note to run another year. The treasurer said he would see the trustees, and the latter, when informed of the principal's request, would



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simply say, "let it run." The principal would afterward see the treasurer and ask him if it was all right, and the latter would say "yes." This appears to have been all that was done in the way of making extensions. There was no payment of interest in advance, so as to prevent appellant from commencing suit at any time, and no agreement on the part of the principal to keep the money and pay interest upon it for any definite time. This was the manner in which the business was done during all the years following March 2, 1887, and we think it was altogether too loose and indefinite to constitute a binding contract upon appellees as sureties. There was no consideration for these supposed extensions and therefore they bound no one. *Crossman v. Wohlleben*, 90 Ill. 537; *Heenan v. Howard*, 81 Ill. App. 629.

If the principal in his testimony gives a correct version of the transaction, no time as to extensions was ever mentioned with any definiteness. In any view we have been able to take of this case, as presented by the record, we think the court below came to a correct conclusion upon the facts.

Two propositions were submitted by plaintiff to be held as law by the trial court, and both were refused. This refusal is assigned for error, but the point is not made in argument and must be considered as waived. We may remark, however, that as there was no evidence upon which to base the propositions, they were properly refused.

The judgment will be affirmed.

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1. PREFERENCE—*When the First Execution is Set Aside.*—Where a later creditor files a bill and gets the first execution set aside, the next execution thereof, if levied before equity acquired jurisdiction, will be paid in its proper order. Legal rights and preferences, which are acquired before equity takes jurisdiction, will be respected in the distribution of assets.

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2. *SAME—Bill in Aid of Execution.*—A bill filed in aid of an execution outstanding in the hands of the sheriff does not create an equitable lien as against prior valid execution liens which have previously attached to the same property. In such cases the complainant must finally get his payment by virtue of his execution, and can only get what his execution will, in its due legal order, bring him.

3. *PARTNERSHIP—The Right to Have the Firm Property Applied to Firm Debts.*—The right of a firm creditor to subject the firm property to the payment of his debt in equity, to the exclusion of the creditor of an individual partner, results solely from the right of the other partner to have the partnership assets applied to the payment of the partnership debts.

4. *SAME—Waiver of the Right to Have Firm Assets Applied in Payment of Firm Debts.*—A partner may waive his right to have the firm property applied to the payment of the partnership liabilities. When he does so, the equity of the creditor is at an end.

5. *INJUNCTION—When Not Necessary as Against a Sheriff.*—An injunction is not necessary against a sheriff who has proceeds of executions in his hands for distribution to different persons. A mere notice to him not to pay out the proceeds till the determination of the question is sufficient.

*Creditor's Bill.*—Appeal from the Circuit Court of LaSalle County: the Hon. HARVEY M. TRIMBLE, Judge, presiding. Heard in this court at the May term, 1899. Affirmed in part and reversed in part. Opinion filed October 12, 1899.

A. J. HOPKINS, F. H. THATCHER, F. A. DOLPH and C. P. GARDNER, attorneys for appellants.

HOPSON & HOLLEMBECK, McDougall & Chapman and ELMER H. ADAMS, attorneys for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

Prior to the entry of the judgments herein recited, Joseph W. Gregg, Daniel H. Gregg and Arthur A. Chapell were partners, as Gregg Brothers & Chapell, in the business of merchants at the village of Triumph in La Salle county. On December 2, 1897, judgments were entered against said firm, and executions issued and placed in the hands of the sheriff of said county in favor of the following named plaintiffs, for the amounts and in the order named, viz.: Elgin National Bank, \$802.55; C. E. Chapell, \$2,853.98; A.

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E. Wheeler, \$120; John Pritzloff Hardware Co., \$492; Mendota National Bank, \$275.73; F. E. Royston & Co., \$557. On December 3, 1897, Madden & Goedtner recovered a judgment against said firm for \$1,658.20, and had execution issued and delivered to the sheriff. He levied the first of these executions upon the tangible firm property, which was all personalty, and advertised it to be sold December 17, 1897. Prior in date to said judgments and executions was an execution from the Circuit Court of McHenry County, in favor of Edward Morton, against a former firm of Gregg & Lamson, for \$322.25, which was also levied upon the interest of J. W. Gregg in said firm property. On December 6, 1897, John Spry Lumber Company (hereinafter called the Lumber Company) obtained two judgments against Gregg Brothers & Chapell, in the Circuit Court of La Salle County, one for \$2,000, and the other for \$640.81, and had executions issued thereon and placed in the hands of the sheriff, who by its direction retained the former but returned the latter *nulla bona*. Thereupon the Lumber Company filed a general creditor's bill against said debtor firm and Madden & Goedtner, based upon its said judgment for \$640.81, execution upon which had been returned *nulla bona*. The main object of the original bill was to obtain a receiver and get control of the book accounts and bills receivable, some interest in which had already passed to Madden & Goedtner. A receiver was appointed and a part of said book accounts and bills receivable passed to his possession and were collected and distributed in a manner not here in controversy. The receivership did not relate to the property previously levied upon by the sheriff, nor affect his sale thereof. On December 15, 1897, the Lumber Company filed an amended bill attacking the judgments of Morton, C. E. Chapell and Madden & Goedtner, and charging that C. E. Chapell was a member of the firm of Gregg Brothers & Chapell, and that A. A. Chapell was only the representative and agent of C. E. Chapell in said firm. The prior judgment and execution creditors were made defendants. On December 16, 1897, the Lumber Company obtained

an injunction staying a sale by the sheriff under the Morton execution, and directing that after sale under the other executions the sheriff retain the proceeds as a fund in lieu of the property levied upon, and subject to all the rights of the parties as they might thereafter be determined. The bill was afterward again amended. It was answered by most of the defendants, and F. E. Royston & Co. filed a cross-bill, which was answered. The court heard the proofs, and on March 8, 1899, entered a decree. Of its many details only those need be stated which affect the matters of which complaint is here made in argument. The decree found that the judgment in favor of C. E. Chapell was by confession upon three judgment notes; one dated November 5, 1896, for \$1,000, with interest at six per cent; one dated January 15, 1897, for \$500, with interest at seven per cent; and one dated March 10, 1897, for \$1,000, with interest at six per cent—the first and last each with an attorney fee; that interest had been paid on said several notes to July 15, 1897; and that said note of November 5, 1896, was not signed by the firm but by the several members thereof individually, and was not given for a firm debt. The decree provided that C. E. Chapell should only be paid the amount due on his second and third notes on December 2, 1897 (thus cutting out not only the first note but also interest on any part of said judgment after that date, and the attorney's fees), and found that the executions of A. E. Wheeler and the John Pritzloff Hardware Company, and a balance remaining unpaid upon the execution of the Mendota National Bank, were entitled to be next paid, and that the Lumber Company was entitled to the balance of the fund in the hands of the sheriff prior to the other executions intervening between the executions of C. E. Chapell and the Lumber Company. It ordered the payment in full of the Wheeler and Hardware Co. executions and \$141.72 on the Mendota Bank execution, and the payment to the Lumber Company of \$985.68 on its \$2,000 execution, being the balance, apparently, of the fund. The purpose seems to have been to pay those executions which

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would have been paid from the fund in the hands of the sheriff if C. E. Chapell's execution had not been reduced, and then to pay the rest of the fund to the Lumber Company, thus giving the latter all the benefit of the reduction of C. E. Chapell's execution. The Lumber Company's judgment of \$640.81 was by the decree ordered paid out of the equitable assets in the hands of the receiver to the extent they would reach it after discharging prior liens upon said equitable assets. The decree directed that out of the reduced amount to be paid C. E. Chapell the sheriff pay the costs arising out of the issues litigated between the Lumber Company and C. E. Chapell. The amount in the hands of the sheriff was insufficient to reach the execution of F. E. Royston & Co. by the distribution ordered, while if said several executions following that of C. E. Chapell had been paid in the order in which they reached the sheriff and were levied, Royston & Co. would have been paid in full as the result of the reduction of C. E. Chapell's execution. Royston & Co. and the Lumber Company each prayed appeals and filed appeal bonds. Royston & Co. filed the present record, and the Lumber Company and C. E. Chapell respectively assigned cross-errors thereon. C. E. Chapell complains because his execution was reduced and because he was deprived of interest and attorney fees and made to pay the costs. The Lumber Company complains because the C. E. Chapell execution was not wholly set aside. Royston & Co. complain because the Lumber Company was given priority over executions which were liens prior to its execution. These complaints present the main questions argued here.

Arthur A. Chapell was the son of C. E. Chapell, and somewhat wild and inclined to spend money improperly. C. E. Chapell was instrumental in getting Gregg Brothers to take his son into partnership, but it is clear from the proofs (including a bill of sale to A. A. Chapell) that C. E. Chapell was not himself a member of the firm. The note to C. E. Chapell for \$1,000, dated November 5, 1896, and signed by the several members of the firm, was for money

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which went into the firm business. According to the testimony of J. W. and D. H. Gregg it was money C. E. Chapell loaned to his son A. A. Chapell to be put into the firm as his son's share of the capital. The Greggs testified they signed the note at the request of C. E. Chapell, in order to make A. A. Chapell feel under obligations to them, but with a private understanding they would not be called upon to pay it. F. J. Hatheway testified A. A. Chapell told him he considered the \$1,000 note a personal debt of his own to his father. On the other hand C. E. Chapell and A. A. Chapell testified that it was agreed by A. A. Chapell and the Greggs, before this \$1,000 was loaned, that the firm should be responsible to C. E. Chapell for its repayment. Chas. A. Etnire and C. C. Chapell (another son of C. E.) testified to admissions by D. H. Gregg that this was a firm debt, and the cross-examination of the Greggs weakened the apparent force of their testimony. It is very unusual for persons to sign a note for a large amount for such a purpose, and with such a private unwritten counter-agreement as they described. Nor is it likely that when this note was signed the Greggs saw any special difference between the firm being responsible for repayment to C. E. Chapell and each member of the firm being responsible therefor, and to the latter, at least, their note shows they then agreed. The fact that the firm name is not signed, perhaps tends to show that it was not regarded as a firm debt, but is unimportant if the note was in fact for a firm debt; at least, the Lumber Company can hardly contend otherwise here, for both its execution for \$2,000, upon which a payment was by the decree herein directed, and its execution for \$640.81, upon the return of which unsatisfied its original bill was based, are against Daniel H. Gregg, Joseph W. Gregg and A. A. Chapell individually, and not against the firm by name, whereas the executions of C. E. Chapell, John Pritzloff Hardware Co., Mendota National Bank, F. E. Royston & Co., and Madden & Goedtner are against the firm as such. But the trial judge saw these witnesses upon the stand, and could best judge of their

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credibility, and we do not feel disposed to disturb his conclusions that the note of November 5, 1896, was not for a firm debt. The other two notes entering into the C. E. Chapell judgment clearly were given for money loaned the firm. In those respects we affirm the decree.

The Lumber Company, however, urges that the execution of C. E. Chapell should be wholly postponed to that of the Lumber Company because of certain correspondence. Under date of September 7, 1897, the Lumber Company wrote C. E. Chapell (who lived at Elgin, Illinois) a letter, the body of which was as follows :

"Your son, of Gregg Bros. & Chapell, called upon us this morning and referred us to you as to the financial standing of Gregg Bros. & Chapell. We are selling them lumber and the commercial reports give us no definite information as to their financial standing. Will you please advise us if you consider them a good risk for an open account of \$1,000 or thereabouts. You might at the same time advise us as to their assets and liabilities, so far as you know. Of course we expect you to treat this the same as though your son was not in the concern, freely and fairly. A prompt reply will oblige."

To this he replied on the 9th as follows:

"Your letter of the 7th, regarding Gregg Bros. & Chapell, of which my son is a member, is at hand. Would say in reply that my attention was called to the opening, and an opportunity to secure a one-third interest for my son, last November. I went down and investigated and was very favorably impressed with the outlook for building up a very nice business. To be sure they started with limited capital, each putting in one thousand dollars. The business picked up so fast that in the three departments they needed more funds and I assisted them to \$2,250. I have been down once or twice a month to watch their methods and find they are running it very careful and with light expense. The money I have advanced is a personal loan to the firm and my intention is to carry it myself and give them time to meet the figures—sixty or ninety days bills—to the houses with whom they do business. The last time I was down we ran through the stock and found they had some over \$2,000 in the hardware department, \$2,500 in the lumber and \$4,500 in all, store fixtures, etc., and nearly

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\$3,000 on their books against a good class of farmers. Their outstanding debts to different firms at that time was about \$4,000. With present advance in produce, their collections are very much better, as money is coming in more fast, and I can see no reason why they can not meet their bills at maturity, and I think they will be in shape to discount their bills at sight, as I deem the first year the hardest one.

P. S.—I intend to keep familiar with the business, and advise with them from time to time, and do all I can to make it a success.”

It is not charged any part of this letter was untrue when written. It disclosed a firm indebtedness of \$6,250; enough, surely, to put the Lumber Company on its guard. It disclosed that C. E. Chapell intended to give the firm time on their debt to him, but it said nothing which bound him to inactivity if he found the firm was going to fail. Nor did any officer of the Lumber Company testify (so far as the abstracts show) that it was induced to give credit to the firm because of said letters, the nearest approach thereto being the testimony of one Westgate, that he heard C. E. Chapell say if it had not been for him the firm would not have got their lumber on time; that it was through his influence with the Lumber Company that they trusted him. But if said letter is subject to the construction now put upon it by the Lumber Company, yet the Lumber Company did not, in its original or amended bill or any amendments thereto, set up any such case against C. E. Chapell, or allege it had been misled or defrauded by him, or plead such letter or any estoppel against him as a reason why the Lumber Company's execution should be given priority over his. In the absence of allegation there could be no relief given the Lumber Company because of said letter.

We are of opinion C. E. Chapell should not have been deprived of interest upon that part of his judgment which was based upon his notes dated January 15, and March 10, 1897, nor of the \$10 attorney fees, provided in the last note. The other \$1,000 note included in the judgment was a *bona fide* debt of the several members of the firm for money which went into the business. It is not shown that it was



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included in the judgment against the firm for any fraudulent purpose. The question whether it was not agreed, at the time, that the loan should be a firm debt, is too close from the evidence to warrant any conclusion it was put in judgment against the firm for any wrongful purpose. C. E. Chapell should have been paid so much of the principal of his judgment as was based upon said notes of January 15 and March 10, 1897, and said attorney's fee of \$10, and interest upon that part of said judgment from December 2, 1897, to December 17, 1897, the date of the sheriff's sale, when distribution would have been made but for the motion of said Greggs and said injunction order. We also hold C. E. Chapell should not have been so heavily mulcted in costs. The amended bill charged him as a partner, and the Lumber Company failed in that contention. It attacked his entire judgment, and succeeded only as to about two-fifths of it. We understand that the costs and expenses of the receivership have been paid out of the fund obtained by the receiver, and think it more equitable that the other taxable costs should be divided, C. E. Chapell, the Lumber Company, and the fund in the hands of the sheriff, each paying one-third.

Was the Lumber Company entitled to be paid upon its execution, being the eighth that was levied, to the extent the C. E. Chapell execution was reduced, in preference to the executions which intervened between those of C. E. Chapell and the Lumber Company?

First. This is not a case where the Lumber Company discovered assets which had not been reached by the creditors having prior executions. Each execution of the seven preceding that of the Lumber Company was a lien upon all this property, and was such lien before the Lumber Company had even obtained its notes, upon which it afterward recovered judgments and obtained an execution which became a later lien upon the same property. We think it settled by *Atwater v. American Exchange National Bank*, 152 Ill. 605, that where a later creditor files a bill and gets the first execution set aside, the next execution thereto, if

levied before equity acquired jurisdiction, will be paid in its proper order. It was there said: "Legal rights and preferences which are acquired before equity takes jurisdiction will be respected in the distribution of assets." In that case judgments were obtained, executions issued and levied upon the property of the debtor in the following order, viz.: Wm. E. Atwater, American Exchange National Bank, Harrington & Goodman and Victor D. Gowan. Thereafter other creditors filed a bill which resulted in the defeat of the Atwater execution. Upon rehearing it was held that the next three executions would take the avails of the sale in the order they were levied till the proceeds were exhausted. The amended bill in this case was filed in aid of the Lumber Company's \$2,000 execution. The proper purpose of such a bill is not to advance the complainant's execution over other prior valid executions, but to remove some obstacle, such as a prior invalid execution, so that if possible the proceeds of property sold on execution may reach complainant's execution. In this case the debtors are not found to have done anything fraudulent, or even wrongful, for they did not sign the firm name to the C. E. Chapell \$1,000 note, and no equitable assets were discovered by the amended bill; but the assets out of which the Lumber Company has obtained priority for its \$2,000 execution are personal chattels which were in the hands of the sheriff under other valid and prior executions before the Lumber Company obtained its judgments and executions and resorted to a court of equity. A bill filed in aid of an execution, outstanding in the hands of the sheriff, does not, in our judgment, create an equitable lien as against prior valid execution liens which have previously attached to the same property. In such case the complainant must finally get his payment by virtue of his execution, and can only get what his execution in its due legal order will bring him.

Second. It is clear from the oral and documentary evidence that Gardner, acting as attorney for the Mendota National Bank and F. E. Royston & Co., and Clark, a member of the latter firm, first ascertained that this \$1,000 note

of November 5, 1896, was claimed by the Greggs not to be a partnership debt; and that they induced the Greggs to direct their attorney to enter a motion in C. E. Chapell's case to vacate the judgment and for leave to plead as to the \$1,000 note. Wheeler, attorney for the Greggs, was then consulted by Gardner and Clark, as to the course to be pursued to present this matter to the court. All this was before the Lumber Company obtained even the notes upon which were based its judgments, executions and first creditor's bill. By the procurement of Gardner and Clark, a full affidavit of the facts was prepared by Wheeler, signed and sworn to by D. H. and J. W. Gregg, and filed and the motion entered in the cause by the Greggs on December 15, 1897. The amended bill of the Lumber Company, alleging said \$1,000 note was not a firm debt, was filed the same day, but it was filed after the Greggs had made their motion to vacate the judgment and had filed their affidavit, for said amended bill sets up the entry of said motion and the filing of said affidavit in support thereof, and makes formal reference thereto. True, the amended bill purports to have been sworn to in Chicago the day before, December 14th, but if that date is not an error, then the reference to said motion and affidavit must have been written in after the amended bill was sworn to and before it was filed, unless, indeed, as is very likely, the solicitor for complainant knew of the preparation of said motion and affidavit, and supposed it had been theretofore filed. The affidavit to the amended bill states that complainant did not know the facts therein set forth (of which this \$1,000 matter is one) when it filed its original bill on December 6th; but Gardner and Clark ascertained the facts on December 3d. The written motion of the Lumber Company for an order to stay distribution of the proceeds by the sheriff after he should sell, is expressly based upon the motion entered by the Greggs to vacate the judgment of C. E. Chapell, and upon their affidavits so procured by Gardner and Clark. The injunction order recites and is based upon the fact that the Greggs had entered said motion in C. E. Chapell's case. It was after-

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ward stipulated between C. E. Chapell and Gregg Bros. & Chapell in said action at law that said motion should abide the determination of this cause. The Lumber Company therefore was not the discoverer of the facts; it brought nothing to light not previously known to the prior execution creditors. It is clear the judgment could have been reduced to the proper sum owing by the firm on the motion entered by D. H. and J. W. Gregg, defendants therein. (Campbell v. Goddard, 117 Ill. 251; Cassem v. Brown, 74 Ill. App. 346.) The Mendota Bank and F. E. Boyston & Co. were pursuing a proper course in seeking to have the payment of the firm debts out of the firm assets worked out through the partners. The equity set up by the Lumber Company is not an original equity to which it is entitled as of its own right as a creditor of Gregg Bros. & Chapell. The equity is that of the partners only. Upon this subject the rule is thus stated in Young v. Clapp, 147 Ill. 76:

“The right of a firm creditor to subject the firm property to the payment of his debt in equity, to the exclusion of the creditor of an individual partner, results solely from the right of the other partner to have the partnership assets applied to the payment of the partnership debts. The rule is for the benefit and protection of the partners themselves. The equity of the creditor is of a dependent and subordinate character, and is to be worked out and enforced through the medium of the equities of the partners. A partner may part with his right to have the firm property applied to the payment of the partnership liabilities. When he does so, the equity of the creditor is at an end.” (Ladd v. Griswold, 4 Gilm 25; Farwell v. Huston, 151 Ill. 239.)

The Mendota National Bank and F. E. Royston & Co. procured the partners to act and enter the proper motion. They did it immediately after the failure and before the Lumber Company had either notes or judgment. They ought not to be deprived of the results of their diligence. No injunction against the sheriff was necessary. A mere notice to him not to pay out the proceeds till the determination of the motion would have been sufficient. True, that notice had not been given on December 15th, when the amended

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bill was filed, but as the sale was to be held on the 17th, there was plenty of time for that. We do not hold the Lumber Company had no right to file its amended bill and get an injunction if it saw fit, but only that such course was unnecessary; that the Lumber Company was not the first creditor to discover the facts and set in motion measures to prevent C. E. Chapell recovering money upon his first note, and that the Lumber Company has not, by its bill, entitled itself to payment out of the order in which the executions were received by the officer.

We are of opinion the proposed amendment to the Lumber Company's amended bill, attacking the judgment of the John Pritzloff Hardware Co., did not bring that corporation within the terms of the statute invoked, and did not show grounds entitling the Lumber Company to equitable relief, and that it was not error to refuse leave to file it.

The decree of the court below is reversed so far as we have herein indicated that it is erroneous, and in all other respects it is affirmed; and the cause is remanded to the court below with directions to modify its decree in conformity with the views herein expressed. The costs of this court will be adjudged against the John Spry Lumber Company. Affirmed in part and reversed in part.

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### Commercial National Bank v. Kirkwood, Miller & Co.

1. **GARNISHMENT**—*Judgment Creditor of Partnership Can Not Garnish Debt Owed to One Partner.*—A judgment creditor of a partnership or of two joint judgment debtors, can not, by garnishment, reach a debt due to one only of the partners, or owing to one only of the joint judgment debtors.

2. **SAME**—*Contracts of Novation.*—Where A, for a valuable consideration, promises B to pay money to C upon a debt B owes to C, and C has notice of the arrangement, consents thereto and accepts A as his debtor for such sum, C will be entitled to payment from A, as against another creditor of B, who afterward garnishees A.

**Garnishment.**—Appeal from the Circuit Court of Peoria County; the Hon. LESLIE D. PUTERBAUGH, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

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McCULLOCH & McCULLOCH and IRWIN & SLEMMONS, attorneys for appellants.

MATTHEWS & GRIGSBY and A. G. CRAWFORD, attorneys for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

The Commercial National Bank and the Bank of Commerce, of Peoria, Illinois, being creditors of the firm of Kirkwood, Miller & Co., began attachment suits against said firm in the Circuit Court of Peoria County. In the suit brought by the Commercial National Bank garnishee summons was, on January 7, 1893, served by the sheriff of Pike county upon Jefferson Orr and Ella M. Orr, his wife. They did not owe said firm, but there had been certain dealings between them and Allen C. Rush, a member of the firm of Kirkwood, Miller & Co., which gave rise to an indebtedness which the bank, by said garnishee process, sought to reach and apply upon its demand against the firm. These dealings began December 28, 1892, by the sale of certain lands from Rush to Jefferson Orr and Ella M. Orr, respectively. On December 30, 1892, said firm executed, and on December 31st delivered, an assignment of the firm property for the benefit of creditors. On January 2, 1893, a new agreement was made between Rush and Jefferson Orr which clearly eliminated Ella M. Orr from the indebtedness arising out of said dealings, and left Jefferson Orr the only person liable to any one therefor. By the instrument of January 2, 1893, Jefferson Orr agreed with Rush to pay Benjamin Newman and several other creditors of Rush who were therein named, certain specific sums therein stated, provided the title to the land bought of Rush by himself and wife, on December 28, 1892, was perfect. While this language was general, the only imperfection in the minds of the parties arose out of the assignment of Kirkwood, Miller & Co. Orr had learned of the assignment, but had not seen the instrument, and was not sure it did not convey the individual property of Rush. It is not claimed by any party to this suit that said assignment operated upon the individual

property of Rush. Orr soon ascertained it did not, and testified he would then have paid the parties named in said instrument if he had not been served with garnishee summons as above stated; after which, for his own protection, he delayed payment till the decision of this case. Therefore the possible defect in title the parties had in mind did not exist; and the promise to pay is in fact absolute and unaffected by the condition. The beneficiaries in said instrument of January 2, 1893, sought to secure the enforcement of their rights by bill in chancery, but in *Commercial National Bank v. Newman*, 55 Ill. App. 534, and *Newman v. Commercial National Bank*, 156 Ill. 530, jurisdiction in equity was denied on the ground the jurisdiction of the Circuit Court of Peoria County in said garnishee suit, which first attached, was adequate to protect and enforce the legal rights and equities of all the parties. The garnishees then answered. Newman and the other beneficiaries under said instrument of January 2, 1893 (except two who had been paid), intervened in the garnishee proceeding, and filed petitions claiming the fund. The Bank of Commerce was notified, and came in and set up its claim. The cause was tried without a jury and the money was ordered paid to said intervenors, Newman and others. This court affirmed the judgment in *Commercial National Bank v. Kirkwood*, 68 Ill. App. 116, but was reversed by the Supreme Court in 172 Ill. 563. The reversal was for error of the trial court in passing upon propositions of law presented, viz., in refusing to hold that the instrument of January 2, 1893, did not constitute an assignment of the fund to the beneficiaries therein named, and in refusing to hold "that in order to entitle the interpleaders to recover the moneys it was necessary for them to show an acceptance of the terms of said agreement and the acceptance of Jefferson Orr as their creditor (debtor) for the respective amounts named in said contract, prior to the service of the garnishee process." The record then before the court did not show an acceptance by all the beneficiaries, and did not show whether the acceptance of any of them was before the service of the

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garnishee process. Upon another trial in the Circuit Court after the cause was remanded much additional evidence was introduced upon the subject of the fact and date of such acceptance by the beneficiaries. The court again entered judgment in their favor, and the Commercial National Bank now prosecutes this appeal therefrom, and the Bank of Commerce has assigned cross-errors.

We are of opinion the evidence in the present record establishes that the several interpleaders had notice of said arrangement and consented to and accepted it, and accepted Orr as their debtor for the respective sums he had promised to pay them by said instrument, and that this occurred as to each beneficiary before the service of the garnishment process upon the Orrs. Under the principles laid down by the Supreme Court in this case in 172 Ill. 563, the right of the petitioners became perfect upon such acceptance, and the liability of Jefferson Orr to said beneficiaries became fixed, and no longer subject to revocation by Rush. The purpose to accept and the actual consent to the arrangement and acceptance of Orr as their debtor, and reliance upon him, was put in different language and evidenced by different acts by the various beneficiaries. But that acceptance did not need to be in writing nor by any particular form of words. The judgment, therefore, was correct. The case last cited settles the principles of law governing the parties, and the rulings of the trial court upon the propositions of law presented at the last trial are in the main in harmony therewith; and if, in one or two respects, said rulings are slightly incorrect, yet the decision is right, and should be affirmed.

It may further be said that Rush had an equitable right to have his individual creditors paid first out of his individual property before firm creditors should be permitted to resort thereto; and in entering into the arrangement evidenced by the instrument of January 2, 1893, Rush was endeavoring to secure that benefit for his individual creditors. There was nothing fraudulent or collusive in his course, nor did it inflict any wrong upon the creditors of



the firm. No reason exists why we should split hairs over the particular words used by each beneficiary in accepting the arrangement, in order to defeat what Rush had a right to do for his individual creditors.

The judgments of the Commercial National Bank and of the Bank of Commerce are against the firm of Kirkwood, Miller & Co. Orr is not and never has been indebted to Kirkwood, Miller & Co. The claim of said banks is only that he owes Rush, one of the members of said firm.

It was settled in *Siegel, Cooper & Co. v. Schueck*, 167 Ill. 522, and in *C. & N. W. R. R. Co. v. Scott*, 174 Ill. 413, that a judgment creditor of a partnership or of two joint judgment debtors, can not, by garnishment, reach a debt due one only of the partners, or owing to one only of the joint judgment debtors. The legal reasons for the rule are fully stated in said opinions. Under these decisions the true title of this garnishee proceeding is *Kirkwood, Miller & Co. for the use of the Commercial National Bank v. Jefferson Orr and Ella M. Orr*; and as neither of the Orrs owe said firm, the garnisheeing creditors can not recover. It is urged that this point can not now be raised, and that the right of the bank to recover if said promise by Orr was not accepted by the beneficiaries is *res adjudicata* by virtue of the absence of reference to the rule above stated in the decision in 172 Ill. That was an appeal by the bank. The court below had determined the controversy for the beneficiaries. They had no occasion to assign cross-errors. That record is not before us, nor the propositions of law requested at that trial, nor the briefs there filed. We can not know whether or not the point now under discussion was then raised. We can not say from the record before us that any decision has been made which bars the beneficiaries from now availing of that defense.

The judgment is affirmed.

Mr. Justice HIGBEE took no part in the decision of this case.

**Mutual Wheel Co. v. Walter J. Mosher.**

1. **ORDINARY CARE—*Must Be Shown.***—Where a plaintiff, suing for personal injuries, fails to show by a preponderance of the evidence, that he was at the time of the alleged accident in the exercise of ordinary care for his own safety, he is not entitled to recover.

**Action in Case, for personal injuries.** Appeal from the Circuit Court of Rock Island County; the Hon. FRANK D. RAMSAY, Judge, presiding. Heard in this court at the May term, 1899. Reversed. Opinion filed October 12, 1899.

SWEENEY & WALKER, attorneys for appellant.

J. T. KENWORTHY and S. R. KENWORTHY, attorneys for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was a suit brought by appellee against appellant to recover damages for personal injuries alleged to have been received by him in falling through a hole, from which a trap-door had been removed, in the engine room of the latter, while attending to his duties as night watchman.

Appellant was at the time of the accident, and had been for some time prior thereto, operating a factory, for the purpose of manufacturing wheels. Prior to the time of the accident, appellee had been in the employment of appellant in several different capacities with indifferent success, and on May 1, 1895, after he had been out of employment for some time, appellant employed him as night watchman, which position he was filling at the time of the accident, which occurred about five o'clock on Monday morning, March 23, 1896.

As night watchman he went on duty at six o'clock in the evening and remained until seven o'clock in the morning. He was required to see that everything was all right around the shop, with reference to fire and trespassers, and had to go through the building every hour, from six o'clock

in the evening until five o'clock in the morning. He was required to sweep the engine room every night, and there being no special time designated for it, it was his custom to do this in the morning after he had made his last trip through the building.

The engine room was forty-seven feet long, east and west, and fifteen feet wide, and was lighted by eight windows—two in the east end of the room, two in the west and four in the south. In the center of the room at the west end was the engine, and south of it, extending a little further east, was the wheel pit, which was protected by a box on the south and east. Directly east of the wheel was the hole in the floor, through which defendant fell. This hole was fourteen and one-half by twenty-two inches and was usually covered by a trap-door of pine flooring. Some six inches east of the trap-door, and about thirty-one inches apart, were two posts six by eight inches in size, which extended from the floor to the ceiling and supported an "idler" for the belt operated by the fly-wheel. This belt extended from the wheel up to the "idler" at an angle of forty-five degrees, and was four feet six inches above the floor at the west side of the trap-door and five feet six inches at the west side of the posts. Appellee made his headquarters in this room, generally sitting at the east end of the room, but sometimes occupying a chair near the north one of the two posts. At the time the accident is alleged to have occurred, appellee states that he had completed his rounds for the night, and, having set his lantern near the middle of the floor, was sweeping the engine room; that in doing this he was walking backward and between the two posts, when he stepped through the hole, and struck his back on the edge of the opening, and received injuries which permanently disabled him; that there was no one present at the time of the accident; that he drew himself out of the hole, and afterward went home; that he suffered pain constantly that day, but did not see a physician until the following day, when he called upon one at his office.

This suit was brought on the 25th day of July, 1896, and

trial was had in March, 1899. The jury gave a verdict in favor of appellee for \$4,716.66 $\frac{2}{3}$ , and a motion for a new trial having been overruled, judgment was entered for that amount.

The principal reason assigned by appellant for the reversal of the judgment, is that the verdict in this case was not sustained by the evidence. The record is quite voluminous and a large portion of the evidence contained in it was devoted to the question whether or not appellee was guilty of contributory negligence in bringing about the accident complained of. Appellee testified that he never knew there was a trap-door at the place in question, and that he had swept directly over the place on the Saturday and Sunday mornings prior to the accident. It appeared, however, that the door had been removed on Friday afternoon by the assistant engineer, who went below the floor to raise a valve connected with the water pipe, and four witnesses testify that it was permitted to remain off from that time until the time of the accident on the following Monday morning. If such was the fact it is hardly probable that plaintiff, who went in there before dark and came away after daylight, during the time the door was off, could have failed to notice it, and it would have been absolutely impossible for him to have swept over that spot on Saturday and Sunday without seeing the hole.

It also appeared from the evidence of two witnesses that on other occasions they went into and came out of the hole while appellee was present in the room. The greater weight of the proof showed that appellee knew of the existence of the trap-door. It also showed that the door was open and the hole exposed from Friday afternoon until the time of the accident. This was evidently the view taken by the jury, as they found specially that the trap-door or hole in question when open was in plain view, and also that the trap door was off and the hole exposed to view Friday afternoon and Saturday and Sunday before the accident.

It also appeared from a preponderance of the evidence that the trap-door, during the time the hole was open, was lying east of it, right between the two up-right posts. If

such were the case, appellee could not have swept between the posts without noticing it, and could not have walked backward without stepping upon the cover and thereby being notified of danger.

Without going further into details of the proof, it is sufficient to say that we are of opinion plaintiff failed to show, by a preponderance of the evidence, that he was, at the time of the alleged accident, in the exercise of ordinary care for his own safety. Under such circumstances he was not entitled to recover a judgment against appellant for damages.

The judgment of the court below will therefore be reversed, but as in our opinion the evidence was not sufficient to sustain a judgment in favor of appellee, the cause will not be remanded. Judgment reversed.

**Finding of Facts**, to be incorporated in the judgment. We find that appellee knew of the existence of the trap-door mentioned in the evidence, prior to the occurrence of the accident through which he claims to have received the injuries complained of, and that at the time of such accident he was not in the exercise of ordinary care for his own safety.

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### The Joliet v. John Frances, Sheriff.

1. **CORPORATIONS—De facto.**—Where it appears that there has been an honest attempt to organize a corporation authorized by the laws of the State, and the necessary steps to perfect such organization taken as required by the statute, except that the final certificate has not been recorded, but upon the issuing of such certificate by the Secretary of State, it as a corporation, elects officers and proceeds to the transaction of business as a corporation, and continues to act as such for a period of more than five years, it becomes a corporation *de facto*.

2. **SAME—Existence of a Corporation Can Not be Questioned Collaterally.**—The legal existence of a corporation can not be questioned in a collateral proceeding.

**Replevin.**—Appeal from the Circuit Court of Will County; the Hon. ROBERT W. HILSCHER, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed October 12, 1899.

GEO. S. HOUSE and EDW. G. PURKHISER, attorneys for appellant.

The law is well settled in this State, that, under the plea of *nul tiel corporation*, the plaintiff need only show an organization in fact and a use of corporate franchise. *Mitchell v. Deeds*, 49 Ill. 422; *Marsh v. Astoria Lodge*, 27 Ill. 421; *President and Trustees of Mendota v. Thompson*, 20 Ill. 197; *Town of Lewiston v. Proctor*, 27 Ill. 414; *Hamilton v. Town of Carthage*, 24 Ill. 22.

While it may be assumed that a corporate existence *de jure* depends upon the filing of the certificate of complete organization in the office of the recorder of deeds of the county in which the principal office is located, by reason of a failure so to do, it by no means follows that it did not become a corporation *de facto*. *Bushnell v. Consolidated Ice Co.*, 138 Ill. 67; *Forest Glen Brick and Tile Co. v. Gade*, 55 App. Ill. 181; *Gade v. Forest Glen Brick and Tile Co.*, 165 Ill. 367; *Hudson v. Green Hill Seminary*, 113 Ill. 625.

In order that there shall be a *de facto* corporation, two things are essential: First, there must be a law under which the corporation might be lawfully organized; and, second, user. *American Trust Co. v. M. & N. W. R. R. Co.*, 157 Ill. 641; *Mitchell v. Deeds*, 49 Ill. 422.

HILL, HAVEN & HILL, attorneys for appellee.

The appellate courts of this State will not disturb the findings of the trial court as to questions of fact, unless it is clearly established that such findings are palpably erroneous. *Coari v. Olson*, 91 Ill. 273; *Johnson v. Johnson*, 125 Ill. 510; *Voss v. Venn*, 132 Ill. 14.

Under the general incorporation act, a corporation is not authorized to do business until its articles of incorporation are filed for record in the recorder's office of the county where its principal place of business is situate, and it can not make contracts of any kind or become the owner of property until that is done. *Loverin v. McLaughlin*, 46 App. 373; 161 Ill. 417; *McCormick v. Market Nat. Bank*, 162 Ill. 100; *Gent v. M. & M. Ins. Co.*, 107 Ill. 652.

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A pledgee of stock is not a stockholder. 1 Cook on Stock and Stockholders, Secs. 463-5-8; Travers v. Leopold, 124 Ill. 431.

A corporation, like an individual, may be estopped by matters *in pais*. Herman on Estoppel, Secs. 1168-70; Cobby on Replevin, Sec. 799; Colwell v. Brower, 75 Ill. 516; Kinnear v. Mackey, 85 Ill. 96.

MR. JUSTICE HIGBEE delivered the opinion of the court.

This was an action in replevin brought by appellant against appellee, as sheriff of Will county, to recover possession of certain goods and chattels, constituting the plant of a newspaper and job printing office which had been previously levied on by appellee as the property of one I. V. Park, to satisfy an execution against the latter in favor of one M. J. Rooney, issued November 4, 1896.

Among other pleas filed were one of *nul tiel corporation* and another alleging that appellant had so permitted Park to make use of the property in question, that, as against Rooney, a creditor of Park, the latter must be held to be the owner of the property. A jury was waived, and on hearing the court found against appellant and entered a judgment on the finding in favor of appellee. It appeared from the evidence that on March 30, 1891, I. V. Park, R. R. Bemis and E. E. Pierce obtained a license under the general incorporation act of 1872 for the purpose of organizing a corporation, to be known as "The Joliet." The capital stock was to be \$10,000, divided into 1,000 shares of \$10 each. This stock was subscribed by I. V. Park, 340 shares; E. E. Pierce, 330 shares, and R. R. Bemis, 330 shares. The final certificate of organization of the corporation was issued July 1, 1891, but was not filed for record in the office of the recorder of Will county, where the only office of the corporation was located, until November 19, 1892. On June 27, 1891, Park had negotiated with Barnhart Bros. & Spindler of Chicago for the purchase of certain printing machines, printers supplies and other material, for the sum of \$2,078.79, of which he paid in cash the sum

of \$650, making arrangements to secure time for the payment of the balance. At a meeting of the stockholders of The Joliet, held on the 2d day of July, 1891, as shown by appellant's record book, I. V. Park was elected president, R. R. Bemis, vice-president, and E. E. Pierce, secretary and treasurer. At the same meeting a motion was carried that the officers of the company be authorized to sign on the 3d day of July, 1891, certain promissory notes, bearing date June 27, 1891, payable to Barnhart Bros. & Spindler, for the sum of \$1,428.79, to be delivered to the First National Bank of Joliet, to be held by it in escrow, pending the arrival of a boiler, job press and other material to complete the invoice of Barnhart Bros. & Spindler. At the same time the officers of appellant were in like manner authorized to execute a chattel mortgage upon said property, to secure the payment of said notes. The notes and mortgage above mentioned were afterward executed, as provided for in the resolution, being signed by "The Joliet, I. V. Park, president; E. E. Pierce, secretary and treasurer; R. R. Bemis, vice-president." The chattel mortgage was acknowledged July 3, 1891, by appellant through its said officers, and described the property purchased of Barnhart Bros. & Spindler and involved in this suit. Afterward in June, 1893, this mortgage having expired, a new one was made to secure the notes still remaining unpaid, and was signed by The Joliet, I. V. Park, president, and attested by M. O'Hara, secretary and treasurer. On June 2, 1894, the mortgage indebtedness having been paid, the mortgaged property was released of record to appellant. The property in question was delivered to appellant by Barnhart Bros. & Spindler soon after the execution and delivery of the notes and original mortgage, and it is claimed by appellant that the same has been since used by it in the publication of a daily newspaper, the first paper having been published in July, 1891.

M. J. Rooney entered the employment of The Joliet with the issue of its first paper, in charge of its circulation. In September, 1891, Park solicited him to take an interest in



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the paper and its plant by buying out Bemis, which he consented to do, paying at the time \$100 for the Bemis interest. Thereupon Bemis tendered his resignation as vice-president and director, and Rooney was elected vice-president in his stead. On September 21, 1891, Pierce was removed from his office as secretary and treasurer and Rooney was also elected secretary and treasurer, the record of this meeting being signed in the record book by Park as president and Rooney as secretary and treasurer. Rooney afterward paid in other money, to the amount in all of \$610, was made business manager, and was so advertised at the head of the editorial column of the paper. Rooney afterward sold his interest to other parties, resigned his office and retired from the business. Subsequently he again went to work for appellant, and having received only a portion of the amount due him for his stock, Park caused to be issued and delivered to him a certificate for fifty shares, which Rooney accepted. Park asserts that this stock was delivered to Rooney in full of the amount due him, while Rooney asserts that he accepted the certificate simply as security for his money. On October 28, 1892, Rooney commenced suit against Park by attachment, and levied upon the property in controversy. On the 26th of October, 1896, judgment was duly entered in favor of Rooney against Park, and on November 4, 1896, a special execution was issued, which was also levied on said property. Thereupon the writ of replevin in this case was sued out by appellant. On June 30, 1892, the rent being due for the premises occupied by appellant, Park, after having consulted with an attorney, who told him that appellant had no corporate existence and could not exercise corporate power, gave a chattel mortgage in his own name to the landlord for the rent, which was afterward, on October 22, 1892, paid and released. Park claimed that the money to make this payment was furnished by his wife, and on the day the payment was made, he, in his own name, executed a bill of sale of the property to his wife, which was not acknowledged, but was duly recorded.

It also appears that Park, on October 25, 1892, executed another bill of sale to his wife on the same property, which was acknowledged by him on October 31, 1892,\* but not recorded. There is no proof, however, in the record, that Mrs. Park ever went into possession of the property under either of these bills of sale. Shares of stock in the company had been sold from time to time to other persons than those named, and among them Charles Werner, who received a certificate for ten shares, Swan Anderson ten shares, and Michael Binsen five shares, all of said certificates having been issued August 17, 1891. These shares were duly paid for and were held by Werner, Anderson and the estate of Binsen at the time of the commencement of the suit.

No record of Park's action in mortgaging or executing bills of sale upon the property, was ever entered upon the books of appellant. It does not appear from the evidence that he executed said instruments with the knowledge or consent of Swan Anderson or representatives of Binsen, who has since died, while Werner testified that he never authorized Park to use the property of the corporation as his own and did not know that he had ever mortgaged the property in his own name or used it or any part of it as his own. These stockholders, therefore, could not be bound by the action of Park in mortgaging or conveying the property as his own.

Propositions of law, one and two, submitted by appellee, and held as law governing the case by the court, were based upon the theory that the purchase of the property in controversy was made by Park for himself prior to the time the certificate of incorporation was issued to plaintiff, and before the election of its directors, and that thereby he became the owner of said property; that at the time of the purchase, plaintiff was not a corporation *de facto* or *de jure*, and was incapable of making contracts or acquiring property. We think these propositions of law should have been refused by the court. In our opinion the property in question was purchased of Barnhart Bros. & Spindler, not by

Park, but by appellant, after its certificate of incorporation was issued to it.

It is true that Park made arrangements for the purchase of the property, and paid certain money down, prior to July 1, 1891, but all this was done on behalf of the corporation, which he, and the others associated with him, had already taken steps to organize. Park received credit for the money advanced by him on his stock, and the greater part of the purchase money for the property was covered by the notes and mortgage, given by appellant after it had received its certificate.

There is nothing in the evidence to show that Barnhart Bros. & Spindler ever intended to, or did invest Park with any title to said property, or that they ever parted with the title until it passed to appellant. There can be no doubt, under these circumstances, but that the sale was made directly to appellant. We are also of opinion, that at the time of the sale, appellant was a *de facto* corporation, capable of receiving the property, notwithstanding the fact that it failed to file its certificate of organization until more than a year later.

In *Bushnell v. Consolidated Ice Machine Co.*, 138 Ill. 67, it is said:

"But assuming that a corporate existence *de jure* depends upon the filing of the certificate of complete organization in the office of the recorder of deeds of the county in which its principal office is located, and that the bill properly avers that it was not done in the case of the corporation in question, it by no means follows that it did not become a corporation *de facto* as between the complainant and defendants. From the facts set up in the bill, it clearly appears that there was an honest attempt by the incorporators to organize a corporation authorized by the laws of this State. The necessary steps to perfect that organization were all taken as required by the statute, except that the final certificate was not recorded. It is shown by the bill that upon the issuing of that certificate its directors elected the proper officers and proceeded to the transaction of business as a corporation, and continued to act as such until the filing of this bill, a period of more than five years. That these facts establish a corporation *de facto* is settled by numerous decisions of this court."

In American Loan and Trust Company v. M. & N. R. R. Co., 157 Ill. 641, it is said :

“ But in order that there should be a *de facto* corporation, two things are essential: first, there must be a law under which the corporation might lawfully be created; and, second, user. Where the law authorizes a corporation and there is an attempt in good faith to organize, and corporate functions are thereupon exercised, there is a corporation *de facto*, the legal existence of which can not ordinarily be questioned collaterally.”

In this case, the evidence showed an attempt in good faith to organize a corporation. All the necessary steps were taken, and a certificate of organization was properly issued. The only thing lacking being the proper filing of the latter.

Under the circumstances, we are of opinion that the legal existence of appellant, as a corporation *de facto*, can not be questioned in this proceeding. Certain it is that Rooney, the real party in interest, is not in a position to question the same. He entered into its employment, as its manager, and was so advertised; he purchased stock in the corporation; was elected its vice-president, and afterward secretary and treasurer, and under the latter titles signed appellant's records. After selling out his stock at one time, he again took stock of appellant, either by purchase of the same, or, as he says, collaterally. Having recognized the existence of the corporation in all these different ways, and in his several capacities, as an officer of the same, he should not now be permitted in this suit to deny appellant's legal existence.

The third proposition of law, given for appellee and held by the court, was also erroneous, in that it assumed that the property in question belonged to I. V. Park at the time of the levy of the writ of attachment.

For the reasons above given, the judgment in this case will be reversed and the cause remanded.

**John Myers v. L. O. Lockwood.**

1. **PRACTICE—Hypothetical Questions.**—It is not proper to ask of a witness called as an expert, a question which does not embody a hypothetical statement of the facts, but which directly calls upon the witness to put himself in the place of the jury, and, in view of the evidence submitted, pass upon the whole issue.

**Assumpsit**, for physician's services. Appeal from the Circuit Court of Iroquois County; the Hon. ROBERT W. HILSCHER, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed October 12, 1899.

C. H. PAYSON and NELLY B. KESSLER, attorneys for appellant; C. W. RAYMOND, of counsel.

J. W. KUTTRUFF, FREE P. MORRIS and FRANK L. HOOPER, attorneys for appellee.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

Appellee, a physician and surgeon, sued appellant before a justice of the peace to recover upon a claim for \$75, charged for his services in treating appellant's daughter for a fractured limb. Before the justice appellee recovered a judgment for \$75. Appellant took an appeal to the Circuit Court, where the cause was tried by a jury, resulting in a verdict and judgment in appellee's favor for \$75. A motion for new trial having been overruled appellant brings the cause to this court.

It was admitted by appellant on the trial below, that appellee was a regularly licensed physician, and that if he properly treated appellant's daughter, his services were worth the amount charged, but it was contended and insisted that he so unskillfully and improperly treated her, that she died as a result of his negligence and unskillfulness, and that his services were therefore worthless to appellant. This was the defense, and the sole subject of contention in the trial of the cause.

It is urged, as ground of reversal, that the court erred in allowing the witness Dr. Culbertson to give an opinion as to the propriety of appellee's treatment of appellant's daughter, based upon all the evidence he had heard in the case. The witness having testified that he had heard all the testimony in the case, was asked this question: "Judging from that testimony—assuming that it was all true, all this testimony that has been given in—state whether in your opinion the treatment given by Dr. Lockwood (plaintiff) and Dr. Miller was proper."

The question was objected to by appellant, objection overruled and exception saved, and the witness answered: "The treatment was proper." We think this ruling of the court was erroneous. Had the opinion of the witness been asked upon the testimony of Doctors Lockwood and Miller as a basis, the case might have come within the rule in *Schneider v. Manning*, 121 Ill. 376. But the witness was asked to base his opinion upon the entire evidence in the case, much of which was very contradictory. It could not all be true, and there was no warrant for asking the witness to assume it all to be true, as was done by the question propounded to him. He was substantially asked to pass on all the evidence, and decide the only question in controversy before the court, and which 'it was clearly the province of the jury to determine, and not that of the witness. The rule on this subject is well stated by Higbee, J., in *Henry v. Hall*, 13 Ill. App. 343.

In *Pyle v. Pyle*, 158 Ill. 289, on page 299, it is said:

"It is not the proper practice to ask of a witness called as an expert, a question which does not embody a hypothetical statement of the facts, but which directly calls upon the witness to put himself in the place of the jury, and, in view of the evidence submitted, pass upon the whole issue."

Numerous authorities are cited in support of this proposition, which is undoubtedly the law. In the case at bar we think this rule was violated in permitting the question and answer above set forth, and therein error was committed.

It is also assigned for error that the court refused cer-

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tain instructions asked by appellant, to the effect that if the jury believed from the evidence that the daughter's death was attributable to a want of ordinary care and skill on the part of the plaintiff, while treating the fractured limb, then he could not recover. We think the instruction asked contained a correct proposition of law, fairly applicable to the case, and appellant was entitled to have the jury so instructed. No such instruction was given, and we hold that the refusal so to instruct was error.

The amount involved is not large, but appellant was entitled to have his case fairly tried, which we think was not done, and for the reasons given, the judgment will be reversed and the cause remanded for a new trial. Judgment reversed and cause remanded.

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### Walter Brinckerhoff et al., Interpleaders, v. Francis Greenan, for use, etc.

1. **PAYMENTS**—*Application of.*—A debtor owing his creditor on different past due accounts, may direct upon which account any payment he makes shall be applied; and if he fails to direct such application, the creditor may apply the payment to such past-due account as will be most advantageous to himself. If neither party makes the application, the law will apply it as justice and the equity of the case may require.

2. **SAME**—*When the Court Will Make the Application.*—When the money given in payment arises from some property or fund, the court will apply it to the discharge or reduction of an indebtedness resting against such property or fund.

**Attachment and Interpleader.**—Appeal from the Circuit Court of Iroquois County; the Hon. ROBERT W. HILSCHER, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

C. W. RAYMOND, attorney for appellants.

C. G. HIRSHI and J. W. KERN, attorneys for appellee.

MR. PRESIDING JUSTICE CRABTREE delivered the opinion of the court.

Isaac Stine, one of the appellees, having a judgment for \$80 against Francis Greenan, instituted this garnishee proceeding in the name of Greenan for the use of Stine, against appellees James Harlan and Charles C. Harlan, who were partners in the grain business, under the firm name of "Harlan Bros." Greenan was a tenant of appellees, upon a farm leased to him by them, and had been such tenant for some seven years. The last lease bore date March 1, 1898, and expired March 1, 1899. The rent was \$500 for the year; \$250 being payable October 1, 1898, and \$250 March 1, 1899. Appellants claim that Greenan owed them \$253.50 on the rent of the farm prior to 1898. Greenan sold to Harlan Brothers oats and corn raised on the farm in 1898, on which appellants clearly had a lien for the rent of that year. In October, 1898, after the first installment of rent for that year became due, Greenan offered Brinckerhoff a check for \$150, which the latter refused, demanding \$100 more. Later, Harlan Brothers paid appellants \$250 out of the proceeds of the oats crop of 1898 purchased by them from Greenan.

The contest in this case arises out of the question as to the application of this payment, appellants insisting they applied, and had the right to apply it, on the rent due for years prior to 1898, and appellees contending that as the money with which the payment was made came out of the crop of 1898, it should be applied on the rent for that year. To the garnishee proceedings, Harlan Brothers answered that they had purchased corn of Greenan raised in 1898, to the amount of \$441.26; that Greenan was indebted to them in the sum of \$137.37, leaving a balance due Greenan of \$303.89, which sum they then held; also that appellants were making claims upon this fund for rent, and asked that the conflicting claims be adjusted.

Appellants came in and interpleaded, claiming the whole fund remaining in the hands of Harlan Brothers. A jury was waived and the cause tried by the court. But one



proposition of law was submitted, and that was held in favor of appellants.

The court made an order awarding appellants \$250 out of the fund, being the balance of rent due them for the year 1898 (provided the \$250 paid by Harlan Brothers was considered as applied on the rent for the same year); the court further allowed Harlan Brothers the \$137.37 due them from Greenan, and the balance, being \$53.89, was awarded to Stine, less the costs of the proceeding, to be paid out of such balance. From this order appellants appealed to this court.

This order of the court must have been based upon the proposition that the payment of \$250 made by Harlan Brothers, should be applied on the rent of 1898, and the correctness of this holding is really the only question for our consideration.

Under the statute appellants had a lien on the crops grown upon the premises for the year 1898 for the rent of that year. (Rev. Stat., Chap. 80, No. 31.)

The first installment of that year's rent was due October 1, 1898, before the \$250 was paid. It was paid out of the proceeds of the crop upon which appellants had a landlord's lien. After a careful examination of the evidence, we fail to find that there was any specific directions or agreement as to the application of this payment. It may be that Walter Brinckerhoff, who received the money, intended to apply it on the unpaid rent of 1897, but it is certainly as clear that Harlan, who paid the money, and Greenan, by whose authority it was paid, intended it to be applied on the rent of 1898. As against the Harlans, appellants had no lien upon the crops of 1898 for the rent of 1897. (*Frink v. Pratt & Co.*, 130 Ill. 327; *Prettyman v. Unland et al.*, 77 Ill. 206.)

It is undoubtedly the general rule that a debtor owing his creditor on different past-due accounts, may direct upon which account any payment he may make shall be applied; and that if he fails to direct such application, the creditor may apply the payment to such past-due account as will be most advantageous to himself. If neither party makes the

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application, the law will apply it as justice and the equity of the case may require. (7 Wait's Actions and Defenses, 414; 5 Am. & Eng. Ency. of Law (1st Ed.), 199; Wilhelm v. Schmidt, 84 Ill. 184.)

In this case, the evidence not showing a direction by the debtor as to the application of the payment, nor clearly showing an application by the creditor, how ought the payment in justice and equity be applied?

The money to make the payment came out of the funds arising from the sale of the crop of 1898 upon which appellants had a lien. When the money given in payment arises from some property or fund, the court will apply it to discharge or reduce an indebtedness resting against such property or fund. (5 Am. & Eng. Ency. (1st Ed.), 201; Hicks v. Bingham, 11 Mass. 300; Sanders v. Knox, 57 Ala. 80; Snider v. Stone, 78 Ill. App. 17.)

We think that justice requires the payment in controversy to be applied on the rent due for 1898, and that the court committed no error in so holding.

Complaint is made that the court erred in admitting in evidence a letter of Harlan Brothers to appellants, inclosing a check for \$250, which they refused to accept. Under the circumstances there was no serious error. There being no jury, and the court holding that the letter and check did not constitute a tender, no harm was done by their admission in evidence.

We are of opinion the judgment of the court was right, and it will be affirmed.

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### Frank S. Allen v. James G. Patterson.

1. **CONTESTED ELECTIONS**—*In Case of a Tie*—*Duty of the City Council*.—In case of a tie in the election of a city or village officer, it should be determined by lot, in presence of the city council or board of trustees, in such a manner as they shall direct, which candidate shall hold the office, and until this is done and the tie determined, neither candidate has a right to the office or its emoluments as against the other.

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2. *SAME—Proceedings by Quo Warranto.*—A proceeding by quo warranto is not an election contest between contesting candidates, and where the sitting candidate is ousted by such proceedings it does not adjudge the right to the office to his opponent.

3. *SAME—Effect of a Determination by the City Council.*—The determination of an election contest before the city council in favor of one candidate, extinguishes the *prima facie* title of his opponent, held by virtue of the action of the election officers and of the council, as a canvassing board, declaring him elected.

**Assumpsit, for the emoluments of an office.** Appeal from the Circuit Court of Will County; the Hon. ROBERT W. HILSCHER, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed October 12, 1899.

HILL, HAVEN & HILL, attorneys for appellant, contended that the proclamation of the judges of election, stating the number of votes received by each of the candidates, and the office for which he is designated, is *prima facie* evidence of the result of such election. 2 Starr & Curtis' St., 1690; Catron v. Craw, 164 Ill. 20; Dooley v. Van Hohenstein, 170 Ill. 630.

The decision of a city council in a contested election case, in seating a contestant and unseating the contestee for the office of alderman, is not in this State final and conclusive as to the right of the contestant or contestee to the office. McCreary on Election, Sec. 380; Dillon on Mun. Corp., 4th Ed., Sec. 202, Old Ed., Sec. 141; The State ex rel. Anderson v. Kempf, 69 Wis. 471; People v. Jones, 20 Cal. 53; People v. Holden, 28 Cal. 129; Snowball v. The People, 147 Ill. 260; Patterson v. The People, 65 Ill. App. 651.

A judgment in quo warranto is conclusive on the defendant in any case in which the same question may collaterally arise. Waterman v. C. & I. R. R. Co., 139 Ill. 658.

A contest before a city council is not a judicial proceeding, and its finding is not a judgment. Keating v. Stack, 116 Ill. 191.

The decision of a board or other non-judicial tribunal is only *prima facie* evidence of the correctness of its finding, except in a case where such finding is made conclusive, and that can not be done in cases where quo warranto is a proper

remedy under the constitution and laws of this State. *Town of Kankakee v. McGrew*, 178 Ill. 75.

Under sections 10 and 11 of article 4 of the Cities and Villages act, the result of an election can be determined by lot only in cases where the returns made by the judges of election show a tie vote. *The People v. Crabb*, 156 Ill. 155.

By the common law and the weight of authority in the United States, a *de jure* officer has a right of action to recover against an officer *de facto* by reason of the intrusion of the latter into the office, and his receipt of the emoluments thereof. *Kreitz v. Behrensmeyer*, 149 Ill. 496; *Mayfield v. Moore*, 53 Ill. 431; *Farwell v. Adams*, 112 Ill. 58; *Waterman v. C. & I. R. R.*, 139 Ill. 669.

GEORGE S. HOUSE and JOHN D'ARCY, attorneys for appellee.

Section 34, chapter 24, R. S., relating to cities and villages, declares: "The city council shall be judge of the election and qualification of its own members." In construing that section, our Supreme Court holds that in an election contest between two persons for the office of alderman, the city council has exclusive jurisdiction. *Linegar v. Rittenhouse*, 94 Ill. 208; *Keating v. Stack*, 116 Ill. 191. There is a distinction between an election contest, where two persons claim the same office, and a proceeding by quo warranto to determine whether one exercising the functions of an office is a usurper. The former is a contest between two individuals over a disputed right. The latter is an inquiry in the name of the people, in their sovereign capacity, for the purpose of testing the authority of one holding an office.

One is a remedy granted by the legislature to an elector in his individual capacity. The other belongs to the people of the State in the right of their sovereignty, and is in no manner impaired by the statutes granting to electors, in their individual capacity, the right to contest. *Snowball v. The People ex rel.*, etc., 147 Ill. 266; *People v. Holden*, 28 Cal. 123.

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MR. JUSTICE DIBELL delivered the opinion of the court. Allen brought this action of assumpsit against Patterson to recover the sum Patterson received from the city of Joliet, as compensation for his services, while acting as alderman of the fifth ward of said city. The pleadings were the common counts and the general issue. Jury was waived. The case was tried upon an agreed state of facts. The court found for defendant and plaintiff appeals.

The city of Joliet is organized under the general law for the incorporation of cities, and has seven wards. At the municipal election in April, 1894, Allen and Patterson were rival candidates for the office of alderman of the fifth ward of said city. At the close of the election the judges of election in that ward, made proclamation that Allen was elected. They made a return of said election, showing that Allen received 230 votes and that Patterson received 228 votes, and that Allen was elected. Two days later the city council canvassed the returns, and declared Allen elected. Allen then took the oath of office, and entered upon the discharge of his duties as alderman of said ward, and sat in the city council as alderman. Thereafter, Patterson contested Allen's election before the city council. Under the direction of the city council proofs were taken by depositions by both parties. On June 18, 1894, the city council decided the contest in favor of Patterson and declared that Patterson was elected alderman of the fifth ward at said election. Patterson thereupon took the oath of office, entered upon the discharge of his duties as alderman of said ward, and continued to hold the office and perform its duties till a successor was elected at the municipal election in the spring of 1896, and thereafter qualified. During that time Patterson received \$331.50 from the city as compensation for his services as such alderman.

On July 10, 1894, by leave of court, Allen, as relator, filed an information in the name of the people against Patterson, in the Circuit Court of Will County, charging that Patterson unlawfully held and usurped the office of alderman of the city of Joliet, from the fifth ward thereof. On July

15, 1895, that court entered final judgment in said cause, to the effect that Patterson be and thereby was ousted, removed and discontinued from said office of alderman from the fifth ward of the city of Joliet, and fined one dollar for usurping and intruding into and unlawfully holding and executing said office of alderman. Patterson appealed to this court, where the judgment was affirmed on June 1, 1896. The opinion there filed (*Patterson v. The People*, 65 Ill. App. 651) shows that the Circuit Court found that Allen and Patterson each received 227 legal votes, and that the Appellate Court reached the same conclusion. Patterson appealed therefrom to the Supreme Court, and it is stipulated that there the judgments of the Circuit and Appellate Courts were affirmed. We are not referred to any opinion rendered in the case by the Supreme Court, nor has any such opinion come to our notice. By the time this result was reached the term of the office had expired, and a successor had been elected and had qualified. Allen then brought this suit to recover from Patterson the compensation the latter had received, while he held the office. Allen claims that as Patterson was adjudged a usurper, and the judgment of ouster was rendered against Patterson, he (Allen) then became entitled to the office by virtue of the original proclamation and return of the election officers and the original action of the council canvassing said returns, declaring him elected, and inducting him into the office. If we are to treat the conclusion reached by the Circuit and Appellate Courts that Allen and Patterson each received the same number of legal votes, as binding upon the parties here, then neither party by that fact alone became entitled to the office; but before either was entitled to the office the tie must be determined in some legal manner, and the party succeeding in the determination of the tie, would then be entitled to the office. Section 11 of article 4 of the general act for the incorporation of cities enacts:

“In case of a tie in the election of any city or village officer, it shall be determined by lot, in presence of the city council or board of trustees, in such manner as they shall direct, which candidate or candidates shall hold the office.”

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This duty originally devolves upon the retiring council, when canvassing the returns, and if the election officers had made a return of a tie, as the opinion of this court above cited shows they should have done, it would have been the duty of the retiring council to determine by lot whether Allen or Patterson should hold the office. But the case of *The People v. Crabb*, 156 Ill. 155, holds that if the retiring council does not perform that duty, the succeeding council must, and can be compelled by mandamus to determine by lot which shall hold the office. If, therefore, in the present case, the city council in hearing the contest had decided that Allen and Patterson had each received 227 votes, as from the former opinion of this court it appears was the fact, it should have proceeded to cast lots between the parties. If the council had reached the conclusion that the vote was a tie, that would have given Allen, the sitting member, no right to the office, and no advantage over Patterson. The previous canvass of the face of the returns, and determination therefrom that Allen was elected, did not entitle him to the office, after a tie was ascertained. If Allen had thereafter remained in the office Patterson could equally well have had him ousted by quo warranto. If the council had determined either Allen or Patterson should have the office, without casting lots, the other could, by mandamus, have compelled the council to cast lots. If the decision of the Circuit and Appellate Courts and final affirmance of the judgment had been reached before the expiration of the term of the office, the duty of the city council to determine by lot who should hold the office could have been compelled in like manner. The tie was never determined between these parties, and therefore neither had a right to the office or its emoluments, as against the other.

But the Appellate Court made no finding of facts, and the evidence does not show how many votes the Circuit Court found each candidate received, and does not show the result was a tie; and it is argued here by Allen that the opinion of the Appellate Court is not evidence of the facts stated therein, and that we have no right to look to it to ascertain

what the facts were, and that therefore the record before us does not show the vote was a tie. Without determining to what extent we must shut our eyes to our former opinion, we will further consider the case as if this position were well taken. The proceeding by quo warranto was not an election contest between Allen and Patterson. It ousted Patterson, but did not and could not adjudge the right to the office to Allen. (Snowball v. The People, 147 Ill. 260.) If the court found that Allen was elected, or that the vote was a tie and that the tie had not been determined by lot, then it was its duty to oust Patterson. The judgment of the court in the quo warranto case is capable of being supported, either on the ground that Allen was elected, or that the vote was a tie and that the tie had not been determined by lot. The record proper of the Circuit and Appellate Courts does not reveal which of these conclusions produced the judgment. Therefore the introduction of the judgment in evidence does not determine whether Allen was elected, or whether the vote was a tie, and the tie not disposed of by lot. If the council had seated Allen after the judgment in quo warranto, that judgment could not have been a bar to a suit against Allen in quo warranto on the relation of Patterson or any other citizen, and such relator would not have been estopped by the former judgment from showing the vote a tie, in which case judgment of ouster would have followed against Allen. The determination of the contest before the city council in favor of Patterson wiped out the *prima facie* title Allen previously held by virtue of the action of the election officers and of the council as a canvassing board. The judgment in quo warranto practically nullified the subsequent decision of the council that Patterson was elected, but it could not have the further effect of reinstating Allen in his title, because it was not necessary to the judgment in quo warranto that it should have been determined by the court that Allen was elected; but said judgment was equally valid if the court found the vote a tie, and that the tie had not been determined by lot. Therefore we are of opinion Allen has not shown title to



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the office. Hence he has not shown a right to the compensation.

We disapprove some of the rulings of the trial court upon propositions of law, but are of opinion that if the questions presented by said propositions had all been correctly determined, still the judgment must have been for defendant. We therefore think it unnecessary to discuss said propositions. The judgment is affirmed.

## CASES

IN THE

# APPELLATE COURTS OF ILLINOIS.

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FIRST DISTRICT—OCTOBER TERM, 1899.

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### Edward Kramer v. Northern Hotel Co.

1. QUESTION OF FACT—*Conflict of Evidence*.—Where the evidence in a case is irreconcilably conflicting, unless some error of law has been committed, the Appellate Court will not disturb the findings of the jury upon questions of fact.

2. DAMAGES—*Injuries to Adjacent Premises by the Removal of the Soil*.—Where a building is injured by the removal of the soil upon adjacent premises, if such removal has been done with reasonable skill and care to avoid injury, the owner of the building is without remedy; but if the injury is done by the careless and negligent manner in which such soil is removed, the owner is entitled to recover to the extent of the injury thus occasioned.

**Assumpsit**, on a written contract. Trial in the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1899. Affirmed. Opinion filed October 27, 1899. Rehearing denied.

**Statement**.—Appellant was the lessee of certain premises contiguous and adjoining the hotel building erected by appellee. The latter desired to extend the foundation of its building under the west wall and basement of the building occupied by appellant. A contract in writing was made between the parties, in which, among other provisions, appellee agreed "to pay to the party of the first part (appellant) any damages which he may sustain in and

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about the construction of said hotel building, and for which said party of the second part (appellee) would be liable were it not for this instrument, other than such damages as may be sustained by reason of the use and occupation of the basement, and, in addition thereto, will pay any and all damages which may be sustained by the party of the first part, by reason of the negligence of the party of the second part, its agents or servants, in or about any of the work or operations in or about the said basement."

In pursuance of the contract, appellee took out the old foundation under appellant's west wall, and proceeded to put in a concrete and steel foundation, some twenty-two feet wide, and extending under half the width of appellant's basement, to support the east wall of its new building. It then replaced such portion of appellant's west wall as had been removed, leaving said wall resting upon a portion of the new foundation.

It appears that there had been a downspout, which originally passed through appellant's west wall, where such wall extended some fifteen or eighteen inches above the roof. This spout carried all the water falling upon said roof to a sewer, until, in pursuance of the contract, the latter was removed to the other side of appellant's premises.

It is claimed that in the erection of the east wall of the hotel appellee blocked up this downspout, so that the water from appellant's roof could not run off, and that appellant was thereby damaged; that the weight of the east wall of the hotel building, which was carried up fourteen stories, caused a settlement of appellant's building; that appellee's architects and engineers, in erecting that hotel building, expected that the foundation would settle four and one-half inches, but made no provision to protect appellant's building from the consequences of such settlement. It is disputed how much the settlement was, but the result is claimed to have been that there were cracks in appellant's west wall, in the window sills, the sash and glass, and in the roof. It is charged that the water which could not escape from the roof because of the block-

ing up of the downspout, entered through these cracks, ruined plaster, wall-paper, carpets and bedding, and drove out appellant's boarders, destroying his business; that this settlement of the foundation finally caused floor joists in appellant's building to begin to pull out, and his wall to lean westward, so that appellant was obliged to, and did, put in beams and jack-screws to sustain his floor.

Appellee asserts that it intended and undertook to make a new connection for the downspout by cutting a recess in appellant's west wall where it could connect with a downspout of the hotel building and otherwise; that appellant consented, but that while this was being done, appellant objected and drove the workmen from his roof; and that such damage as was occasioned by water was caused by appellant's refusal to permit the work to go on.

Appellee also insists that it was not its duty under the contract, or otherwise, to support appellant's west wall while the settlement of the foundation was going on, and that such damage as resulted from settlement was chargeable to appellant's failure to support his own wall, and was not appellee's fault.

WILLIAM H. BARNUM and BAENUM, MOTT & BARNUM,  
attorneys for appellant.

BUENHAM & BALDWIN, attorneys for appellee.

MR. JUSTICE FREEMAN, after making the above statement, delivered the opinion of the court.

This was an action of assumpsit. The jury returned a verdict in favor of appellee. The suit is brought upon a contract in writing, and it is clear that appellant's right to recover is dependent upon proof sustaining the allegations of breach of contract.

It is insisted by counsel for the appellee that the evidence is irreconcilably conflicting, and in this we are compelled to agree. Unless some error of law has been committed we should not be justified upon this record in disturbing the

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Kramer v. Northern Hotel Co.

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finding of the jury, upon the questions of fact. Goodman v. Boyd, 44 Ill. App. 249, and cases there cited.

It is insisted, however, that the court erred in giving certain instructions. By the terms of the contract appellee agreed to pay to appellant any damage for which it would have been liable without the contract, except for use of the basement, and all damages caused by negligence of itself and servants. It was agreed that appellee should make, or cause to be made, all proper connections between the sewer, water and gas pipes, so that appellant should not "be disturbed in his use of the sewers, water and gas in said building." It was a question of fact for the jury whether appellee has complied with these and other provisions of the contract, and whether appellant had suffered any damage for which appellee was liable because of negligence or otherwise.

The instructions are quite lengthy, and it is not necessary to quote them in full. In substance, the second instruction told the jury that if one in possession of premises permits a stranger to enter to do certain work, the stranger is legally justified in going on the premises for that purpose; that such permission can be withdrawn, and that if so withdrawn, the stranger, if he remains or goes upon the premises thereafter, is a trespasser, and liable as such; that if the jury believed from the evidence that the defendant had received permission from the plaintiff to do certain work, including the removal of the downspout, and the substitution of another one to carry off the water, and was making every effort to complete said work, and would have done so, had it not been ordered away before the work was completed, and if the plaintiff did so order it away, then the defendant should be found not guilty for any damages caused by failure to complete said work, under such circumstances.

We find no fault with this instruction under the evidence. By the written contract the appellee was allowed the use of the appellant's basement for a certain specified time while putting in the foundation. It was not under the

contract allowed access to appellant's roof. There was evidence tending to show that appellant consented that a pipe should be put in connecting the roof of appellant's building with the sewer or with another downspout, and that appellant revoked the license before that work was completed; and that he refused permission to go on with it, unless he should be paid a further sum of money. He had already received \$1,800 in accordance with the written contract for the use of his basement while the new foundation was being laid. He is not entitled to recover damages, if any were suffered, because of his own interference with the work to which he had consented, and the continuance of which he prevented.

It is urged by appellant's counsel that appellee would have been liable to pay damages caused by the settling of the foundation wall if the written contract had not existed, and that instructions to the contrary were erroneous.

The instructions told the jury in substance that no duty rested upon appellee to support appellant's west wall in order to prevent it from sinking along with its own building; that appellee was required to support appellant's west wall only while the foundation was being put in, provided the support of the wall was left in as good condition as before it entered.

The written contract provided that the appellee should "at its own expense support and sustain the west wall of said building during the excavating and putting in of said foundation." It did not require appellee to support the wall so as to prevent its settling thereafter with the foundation upon which it stood. It was not liable, then, under its contract, for damage occasioned by failure to support the wall pending settlement.

Nor would it have been liable for a settlement of appellant's wall caused by the pressure of the new building upon a foundation built with reasonable skill and care upon its own adjacent land. *City of Quincy v. Jones*, 76 Ill. 231, and cases there cited. In that case it is said: "If injury is sustained to a building in consequence of the withdrawal

Bjork v. I. C. R. R. Co.

of the lateral support of the neighboring soil when it has been withdrawn with reasonable skill and care to avoid unnecessary injury, there can be no recovery; but if injury is done the building by the careless and negligent manner in which the soil is withdrawn, the owner is entitled to recover to the extent of the injury thus occasioned."

It was not a party wall which appellee erected. It was upon its own land, except that the foundation was, by written permission of appellant, extended under the latter's wall for a specified consideration, which was paid. We are of opinion that the case was fairly submitted to the jury, and the judgment of the Circuit Court must be affirmed.

Charles Bjork v. Illinois Central R. R. Co.

1. RAILROAD CROSSINGS—*Duty to Look and Listen*.—It is not always the duty of a person approaching a railway track, as a matter of law, to look and listen for approaching trains.

2. NEGLIGENCE—*When Court May Direct a Verdict*.—Where the conduct of an injured person is so clearly and palpably negligent that all reasonable minds would so pronounce it without hesitation or dissent, the court may and should direct a verdict accordingly.

3. INSTRUCTIONS—*To Find Defendant Not Guilty, When Justifiable*.—An instruction to find a defendant not guilty must be justified upon the ground that the evidence, both for plaintiff and defendant, with all the inferences which the jury might justifiably draw from it, is not sufficient to support a verdict for the plaintiff if one should be returned.

**Action in Case, for personal injuries.** Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for defendant by direction of the court; error by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed October 27, 1899.

KING & GROSS, attorneys for plaintiff in error.

JOHN G. DRENNAN, attorney for defendant in error, JAMES FENTRESS of counsel, contended that an engineer is not re-

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quired to stop the train or to take any extra precautions to avoid accidents when he sees a pedestrian approaching a crossing. He may assume that the pedestrian will use his eyes and ears and take the reasonable precautions necessary to avoid accidents. *Theobald v. C., M. & St. P. Ry. Co.*, 75 App. 208, and authorities cited at page 211; *C., B. & Q. Ry. Co. v. Johnson*, 103 Ill. 520.

It is the duty of persons about to cross a railroad track to look about them and see if there is danger, and not to go recklessly upon the track, but to take the proper precautions themselves to avoid accidents at such places. *C., B. & Q. Ry. Co. v. Damerell et al.*, 81 Ill. 454.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is a suit to recover for personal injuries. The plaintiff, in company with a young woman, was going west upon Seventy-fifth street, across the tracks of the defendant in error at about the midnight hour. These tracks are used also by trains of the Michigan Central Railroad Company. The plaintiff states that as he and his companion approached the crossing they found the gates open, and that when they had crossed several intervening tracks, they saw a Michigan Central train coming slowly from the north. As the engine of this train passed them, it is claimed, it produced a cloud of smoke, in the midst of which, while stepping back away from the passing train, they were struck by an Illinois Central train coming from the south, upon a track which they had previously crossed. The latter train had just left the station at which it had been stopping, less than five hundred feet away. It is said that one arm of the gate across the sidewalk was partly broken off that day, but if, as is claimed, the gate was open, this would be unimportant. No flagman was present at the time.

The view of the plaintiff was unobstructed, and the headlight of the Illinois Central train was in full view, when plaintiff and his companion started to cross the tracks, which at that point were eight in number. The smoke,



which it is claimed enveloped them, had not obscured their view until the moment before the accident. At that time the Illinois Central train, by which they were struck, was already approaching with whatever noise is incident to the starting up of such a train from a station. There was an electric arc light suspended over Seventy-fifth street above the crossing.

Defendant's theory of the accident is, that the parties supposed they could cross ahead of the Illinois Central train, and did so, but finding themselves between it and the last car or cars of the Michigan Central train, they recoiled sufficiently to back into the train by which they were injured. It appears from the evidence that they were not struck by either of the engines, and that the injuries suffered were inflicted by one or more of the cars composing the train.

The injured parties testify that they did not see any headlight, nor hear any whistle or bell, before they were hit. The young woman states that she saw lights, both north and south, but "did not study them out."

While there is some conflict of testimony with reference to the gate being up or down, and it is denied that the Michigan Central engine emitted smoke, as claimed, there is none as to the most material facts. The headlight of the Illinois Central train was properly burning, and it is in evidence that the bell was ringing and whistle sounding, although the plaintiff and his companion state that they did not hear them.

After the evidence upon both sides had been introduced, the court, upon motion of appellee's counsel, instructed the jury to find the defendant not guilty, which was done.

In view of the conceded facts, it is, we think, immaterial whether the arm of the gate extended over the sidewalk upon which the appellant and his companion approached the tracks, was up or down. As we said in *Theobald v. C., M. & St. P. Ry. Co.*, 75 Ill. App. 208, when a passer-by sees a train itself passing, or about to pass, in front of him, he has all the warning gates can give.

The testimony fails to show negligence, upon the part of the appellee, causing the injury. It does, however, show imprudence, at least, upon the part of appellant.

It is true that it is not always the duty of one approaching a railway track, as a matter of law, to look and listen. *C. & N. W. Ry. v. Hansen*, 166 Ill. 623. In this case, however, the view was unobstructed, even by smoke, until after, according to appellant's testimony, he had placed himself in a position of danger. Appellant testifies that his sight and hearing were good, and his companion, that she "saw lights in both directions, little and big," upon the tracks, but did not look close enough to tell whether they were headlights or not, and "did not study them out." Both parties were familiar with the crossing, over which they had frequently passed. The train by which they were injured was not hidden from view by that which was passing in front of them, but was upon the same side upon which they were approaching. Under these circumstances we think the conduct of appellant must be regarded as "so clearly and palpably negligent that all reasonable minds would so pronounce it, without hesitation or dissent." And where the court must say that but one reasonable inference can be drawn from the facts, as to the negligence of the appellant, the court may, and should, direct a verdict accordingly, as was done. *C. & N. W. Ry. Co. v. Hansen*, 166 Ill. 623, and cases cited on page 629.

The instruction to find the defendant not guilty was given at the close of all the evidence. This must be justified, if at all, upon the ground that the evidence, both for plaintiff and defendant, with all the inferences which the jury might justifiably draw therefrom, is not sufficient to support a verdict for the plaintiff, if one should be returned. *Foster v. Wadsworth-Howland Co.*, 168 Ill. 514.

The argument of appellant's counsel does not seriously contend that the evidence tends to show negligence of appellee causing the injury, nor even that appellant's injury was not caused by his own negligence; but that the question of negligence should have been submitted to the

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Morton v. O'Connor.

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jury. Had this been done, and any other verdict returned, "the court could not legally have permitted it to stand." (Foster v. Wadsworth, above cited.) It was not error to instruct the jury to find for the defendant.

The judgment of the Superior Court is affirmed.

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### Joy Morton and Mark Morton v. Patrick O'Connor.

1. INSTRUCTIONS—*Where the Case is Close.*—Where a case is close in its facts the instructions should state the law accurately. The jury, not being judges of the law, in civil cases, are as likely to follow a bad instruction as a good one.

2. SAME—*Invading the Province of the Jury.*—An instruction in a personal injury case, stating that in judging of the preponderance of the evidence the jury should be governed by the quality of the evidence, and not simply by the quantity, and, in judging of the weight to be given to the evidence of the witnesses, they may take into consideration the feeling and bias of any of the witnesses, their manner on the witness stand, their prejudice, if any, in the opinion of the jury, has been manifested either in favor of one party or the other, and in making up their verdict, take into consideration all the facts and circumstances of the case, as detailed before them in the evidence, is confusing and misleading, in a case where clearness and accuracy are demanded, and is erroneous, as invading the province of the jury.

3. WITNESSES—*Credibility of Employes.*—An employe, or party unimpeached, is as credible a witness in the eye of the law as any other, until the contrary appears.

**Action in Case,** for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed October 27, 1899.

FRY & HYDE, attorneys for appellants; WILLIAM BERRY, of counsel.

FRANCIS T. MURPHY, attorney for appellee; ROY O. WEST, of counsel.

MR. JUSTICE SHEPARD delivered the opinion of the court. The appellee was a teamster employed by one Bern-

heimer to haul salt from appellants' warehouse. The warehouse was about 350 feet long, and had fourteen doors or openings through which teams entered to load and pass out of when loaded. The particular doorway in question was about nine feet wide and a little over eleven feet high. A railroad track, of standard gauge, ran along the roadway in front of the warehouse, the inside of the inner rail of which was three and one-half feet from the warehouse. To enable teams to cross the track and enter the warehouse, a plank gangway, which, when lying down, would cover the tracks, was used. That gangway was made of three-inch plank on stringers.

In superficial dimensions it was eight by ten feet, and it weighed about one thousand pounds. When not in use the gangway was sometimes stood up against and across one of the openings into the warehouse, the lower edge resting upon the ground or other planks in the space between the inside track and the building. When so stood up, it had no fastening or force to keep it in position except gravity, and the side of the warehouse against which it stood or leaned.

On the day of the accident appellee was on the premises for the first time. He hauled away one load in the forenoon and returned for another in the afternoon. Some railway cars had, in the meantime, come in upon the tracks, and the gangway had been raised up and stood across the doorway to permit them to pass. Being uncertain of the doorway where he got his first load, he alighted from his wagon and went across the tracks to the place where he saw the gangway standing up, and, as he testified, while he was looking, or "peeking" through a crack in the gangway planks, about three feet above the ground, to see if that was the proper place for him to load, the gangway fell forward upon him, inflicting the injuries to recover for which he brought this suit. He testified he had never before seen the gangway standing up. No person saw him at the moment the gangway fell upon him, and his case, so far as his intervention in the act of its falling is concerned, depends wholly upon his own testimony.

A witness for the defendants testified that, as he drove past the particular doorway, he saw the appellee hanging on the upper edge of the gangway with his arm over it and his chin about even with its top. After so seeing the appellee, the witness drove along about four or five rods, his team walking, and just as he stopped he heard the crash of the falling gangway. He estimated it was not over a minute and a half or two, after observing appellee in the position described, that he heard the gangway fall. Appellee testified that the gangway appeared to stand nearly perpendicularly against the building.

Opposed to him in that respect were three witnesses, including two of the six or eight men who raised and stood it against the building, who testified the gangway stood on a slant, with the bottom from ten inches to two feet further out from the building than the top, and it was further testified that from six to ten men were required to handle the gangway in raising or lowering it.

There was also a sharp conflict in the testimony of the witnesses called by both sides of what admissions, if any, were made by appellee immediately after the injury, concerning his attempt to lower the gangway unaided, and its consequent falling upon him.

It will be thus seen that the question of whether, at the time of his injury, appellee was guilty of contributory negligence, was of controlling importance at the trial, and was a very close one, and required to be submitted to the jury without substantial error.

“Where a case is close in its facts the instructions should all state the law accurately. The jury, not being judges of law, are as likely to follow a bad instruction as a good one.” *I. C. R. R. Co. v. Gilbert*, 157 Ill. 354.

Appellants, by certain instructions tendered by them, sought to have the court tell the jury that the doing of certain things by the appellee constituted negligence on his part, and precluded a recovery by him. Instructions of such character are never good, unless the act specified amounts to negligence *per se*. It is only in rare cases that the law

intervenes and says that the doing of such and such things are, in themselves, negligent acts which will prevent a recovery. Negligence is usually a question of fact for the jury, and so, under the circumstances of this case, if appellee did the things specified in the instructions, it was for the jury, and not for the court, to say whether, in so doing, he was guilty of a want of ordinary care and caution for his own safety, and there was no error by the court in modifying such instructions.

The modification of appellant's eighth instruction is complained of, but it was made no worse by the modification than it was before. It was clearly bad before modification, in that it stated that the use of force by appellee to the gangway, for the purpose of lowering it, would, as a matter of law, defeat his right to recover. Whether so or not was for the jury.

We see no occasion for comment upon the other instructions offered by appellants, and either modified or entirely refused, further than to say we perceive no substantial error in regard to the action of the court in respect of them.

Coming, however, to the instructions given at the instance of the appellee, we are forced to regard that reversible error was committed in respect thereof.

The first instruction given at the instance of appellee is as follows :

"(1) You are instructed that, in judging of the preponderance of the evidence, you should be governed by the quality of the evidence and not simply by the quantity, and, in judging of the weight to be given to the evidence of the witnesses, you may take into consideration the feeling and bias of any witness or witnesses, their manner on the witness stand, their prejudice, if any, in the opinion of the jury, has been manifested either in favor of one party or the other, and in making up your verdict, you should take into consideration all the facts and circumstances of the case as detailed before you in the evidence."

The first proposition announced by the instruction is that the jury should be governed by the quality of evidence, and not simply by the quantity. We do not know what is meant by "quality" in the connection here employed, and

it is not likely that the jury did. At the best, the instruction was in such respect confusing and misleading, and that, too, in a case where clearness and accuracy were demanded. If it be meant that the jury should be controlled by the testimony of the most intelligent, best informed, most credible and least interested witnesses, it was error for the court to invade the province of the jury in thus pointing out to them a class of witnesses whose testimony should be given the greater weight. *Chicago City Railway Co. v. Keenan*, 85 Ill. App., *post*.

We need not speculate as to what other meaning "quality" has, as used, for whatever it may mean, the instruction was in effect to single out by the court a class of witnesses whose testimony the jury should attach a controlling weight to. The jury alone shall determine where the weight of evidence is to be found.

But the instruction is yet more vicious by its assumption that "feeling and bias" existed in some witness or witnesses. There was no direct proof that any witness who testified was actuated by feeling or bias, but it does appear that one of the appellants was a witness, and that many if not most of appellants' witnesses were their employes, and the effect of the instruction was liable to be understood by the jury as a singling out of them as subjects of bias and feeling, there being no others on the side of appellants to whom the instruction could possibly apply. An employe or party unimpeached is as credible a witness in the eye of the law as any other, until the contrary appears. *West Chicago Street R. R. Co. v. Raftery*, 85 Ill. App. 319.

The attempted justification of the instruction that "feeling and bias" are controlled by the words "if any" following "prejudice," can not prevail. As used here, the limiting words apply only to their last antecedent, "prejudice." To carry them back would cause them to relate to the manner of witnesses upon the stand, which would be absurd and meaningless.

It is argued that appellee's third instruction is bad because of, as said, there being no evidence in the record of

the liability of appellee to suffer in the future as a result of the injury.

Appellee lost his leg, and there was evidence tending to show that he had "not been able to do any work since."

We regard such evidence touching his inability to work for a space of about two years preceding the trial as affording a fair inference that such inability was, and was likely to continue, to be attended in some degree with suffering.

It is urged that error was committed in permitting a witness to testify, over appellants' objection, that there were no fastenings used to hold the gangway in position when stood upright. The negligence charged in the second count of the declaration is stated to consist in "placing, keeping, upholding and managing" the gangway "upon and against the door, opening or entrance to said warehouse."

The absence of fastenings was a proper subject of proof to sustain such count.

The refusal to permit a witness to testify that the gangway was in such a position, just before the accident, that it would not fall without the use of force, was proper. An answer to the question would have brought out only an opinion by the witness. Full latitude was given to show how the gangway was placed, and it was for the jury, and not the witness, to draw all proper conclusions.

We do not observe any other questions of law that require comment.

For the error in respect of appellee's first instruction, the judgment will be reversed and the cause remanded for another trial. Reversed and remanded.

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West Chicago St. R. R. Co. v. Timothy O'Connor.

1. STREET RAILWAYS—*Rights of Private Citizens.*—The rights of street railway companies and of private citizens in the public highways are, in law, mutual. Their duties and obligations are reciprocal. Neither has the right, unreasonably or unnecessarily, to obstruct or interfere with the use of the street by the other in a proper manner.



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West Chicago St. R. R. Co. v. O'Connor.

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2. *SAME—Care Required—Obstruction of Streets.*—Where a street car company obstructs the portion of a street outside of its tracks by pushing snow from that part of the street upon which its tracks are laid, and also obstructs one of its tracks with a repair wagon, so that there remains only the other track upon which citizens may drive, it is incumbent upon its employes to be more watchful and cautious to prevent accidents than in cases where the whole street is unobstructed and open to the use of persons driving along it.

8. *INSTRUCTIONS—Burden of Proof and Preponderance of the Evidence.*—The court states in the opinion and approves an instruction upon the burden of proof and preponderance of the evidence.

**Action in Case, for personal injuries.** Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed October 27, 1899.

**Statement.**—Appellant operates a double track street railway running north and south on Desplaines street in the city of Chicago. Lake and Fulton streets cross Desplaines street. Commencing north of Lake street, and at or near Fulton street, is an upward incline in Desplaines street running north 200 or 300 feet to a steam railway viaduct. December 2, 1895, appellee, driving a team of horses attached to a heavily laden wagon, approached from the east on Lake street and turned onto Desplaines street. He drove north upon the east (north-bound) track on Desplaines street, until he reached a repair wagon belonging to appellant, which was standing near the Fulton street crossing, on the east track, while the men upon it were repairing trolley wires overhead. The man upon the trolley wagon refused to turn out so that appellee could continue along the east track. The snow, which had then recently fallen, had been pushed off and to the sides of the tracks by appellant, and lay upon the street between the tracks and the sidewalks, to the depth of one foot or more. On the viaduct, 300 or 400 feet from the trolley wagon, a grip-car of appellant was approaching. Appellee turned from the east to the west track to pass around the trolley wagon. After he had passed the trolley wagon, and as he was turning back onto the east track, the grip-car, then coming down the

incline, struck the forward wheel of the wagon upon which appellee was seated, and threw him off and caused the injury complained of.

ALEXANDER SULLIVAN, attorney for appellant; EDWARD J. McARDLE, of counsel.

JOHN J. COBURN and MUNSON T. CASE, attorneys for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

Counsel for appellant, in their printed brief, say that the "errors relied upon" are as follows, viz.:

"I.

"The court erred in refusing to exclude the evidence and direct a verdict of not guilty.

"(a) On issue of plaintiff's care.

"(b) On issue of negligence charged.

"II.

"The verdict is against the law and the evidence and the weight of evidence.

"III.

"Erroneous ruling on instruction."

First. In this case, as argued by counsel, the burden rested upon appellee to show by a preponderance of evidence (a) that he was himself in the exercise of ordinary care, and (b) that appellant was guilty of negligence as charged in the declaration. Usually these questions of fact are to be determined by the jury, under proper instructions by the court. In this case they were properly submitted to the jury and the verdict was warranted by the evidence.

Appellee was upon the right hand track. He could not proceed further upon that track because of the repair wagon. He could not turn to the right because the appellant had so incumbered that portion of the street with snow that he could not pass with his load on that side of the repair wagon. There was but one way for him to pass the

repair wagon, and that was to turn to the left onto the west track, which he did. The grip-car approaching upon that track was 300 or 400 feet distant on the top of the viaduct. The tracks at that point were straight and there was nothing to obstruct the view of the gripman. Appellee had a right to suppose that the gripman would exercise ordinary care under all the circumstances. The evidence would justify a conclusion by the jury that the gripman did not apply the brakes until he was within a short distance of the appellee. If he did not, that certainly was negligence. If he failed to see the high repair wagon and try to prevent any injury to appellee, that was negligence. The gripman must have known that the snow pushed to the side of the tracks obstructed the passage by loaded wagons. He was bound to exercise what would be reasonable care, taking into account all the facts and circumstances as they then existed, and were apparent to him. The jury must have concluded that he did not. At any rate, they would be justified, under the testimony in this case, in so finding. The rights of the street railway company and of the private citizen in the public highways are, in law, mutual. Their duties and obligations are reciprocal. Neither has the right, unreasonably or unnecessarily, to obstruct or interfere with the use of the street by the other in a proper manner. And when a street car company has obstructed that portion of the street outside of its tracks, by snow pushed from that part of the street upon which its tracks are laid, and has obstructed one of its tracks with a repair wagon, so that there remains only the other track upon which a citizen may drive, it is incumbent upon the employes of the car company to be more watchful and cautious to prevent accidents than if the whole street was unobstructed and open to the use of persons driving along such street.

Second. As to the second assignment of error relied upon on behalf of appellant, counsel fail to indicate wherein the verdict is in any respect against the law. It certainly is not so against the weight of evidence as to justify a reversal by this court of the judgment entered thereon.

Third. The only instruction, the giving of which it is contended by appellant was erroneous, is as follows, viz.:

"The court instructs the jury that while as a matter of law the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence, still, if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although slightly, it would be sufficient for the jury to find the issues in his favor."

Counsel for appellant say that this instruction "substantially removes and excludes from the jury's consideration all the evidence introduced by the defendant" (appellant). It has been held by the Supreme Court and by this court that this criticism is not well founded, and that the giving of this instruction is not erroneous. *Taylor v. Felsing*, 164 Ill. 332; *W. C. St. R. R. Co. v. Marzalkiewicz*, 75 Ill. App. 241.

The judgment of the Circuit Court is affirmed.

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### Charles G. White v. Louis E. Mackey et al.

1. **EQUITABLE RELIEF—*In Foreclosures.***—A court of equity has power to appoint a receiver after sale and grant equitable relief where there are no express words in the mortgage giving a lien upon rents and profits derived from the property, but whether such relief will be granted depends upon the facts and circumstances existing at the time the application is made.

2. **SAME—*Appointment of a Receiver.***—A receiver of the rents will not be appointed in a foreclosure proceeding, unless it be made to appear that the mortgaged premises are insufficient security for the debt, and the person liable personally is insolvent, or at least of very questionable responsibility.

3. **HOMESTEAD—*Not Included in Purchase of Equity in Mortgaged Premises.***—The purchase of an equity in mortgaged premises does not include a right of homestead, that right having been released by trust deed.

**Foreclosure.**—Appeal from the Superior Court of Cook County: the Hon. FARLIN Q. BALL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed October 27, 1899.

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White v. Mackey.

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STILLMAN & MARTYN, attorneys for appellant.

No appearance by appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This is an appeal from a final decree denying appellant's motion for a receiver, entered upon confirmation of the master's report of sale in a foreclosure proceeding.

The report of sale and distribution shows a deficiency of \$189.03, and a decree for this deficiency was entered against the mortgagor, who, it is claimed, is shown to be insolvent. The premises were sold to a stranger to the foreclosure proceedings, and the appointment of a receiver was sought to collect the rents, issues and profits, to be applied under order of court in paying the deficiency, which it appears can not otherwise be collected.

The trust deed contains a provision wherein the maker of the trust deed covenants and agrees that in case of filing a bill in chancery to foreclose, a receiver may be appointed by the court at the time of filing the bill, with the usual powers, and to have immediate possession of the premises, and to lease and collect the rents during the pendency of the suit, and during the statutory time of redemption from sale; and after paying expenses, the remainder of the rents and income are to be applied toward payment of any deficiency not paid by the proceeds of sale. It is also provided in case of foreclosure, sale, and a deficiency not paid by the proceeds of the sale, a receiver may then be appointed, if no appointment has previously been made, with the same rights and powers.

"That a court of equity has power to appoint a receiver and grant equitable relief where there are no express words in the mortgage giving a lien upon rents and profits derived from the property is conceded. In such a case, whether relief will be granted is dependent upon the facts and circumstances at the time the application is made." First Nat. Bank v. Illinois Steel Co., 174 Ill. 140, on p. 149. "Such action will not be taken, however, unless it be made to appear the mortgaged premises are an insufficient security for the debt, and the person liable personally for the debt is

insolvent, or at least of very questionable responsibility." *Haas v. Chicago Building Society*, 89 Ill. 498-502. And such appointment may be made after the sale, because "it could not be ascertained until after the sale whether there would be a deficit requiring the appointment of a receiver to collect the rents and profits during the time of redemption." *First Nat. Bk. v. Illinois Steel Co.*, *supra*.

In the case before us there is no brief filed in behalf of appellee. It is claimed by appellant that a receiver should have been appointed as a matter of equity. So far as appears from the evidence before us, we must agree with this contention. It appears that the mortgaged premises are an insufficient security for the debt, and the person liable therefor is insolvent. As is said in *Wright v. Case*, 69 Ill. App. 535, "No other remedy is available to the appellant as to the deficiency than a receiver of the rents."

There appears to have been a claim set up by some of the appellees that they purchased the premises from a stranger to the record after the execution and record of the trust deed, and are entitled to possession of the premises as a homestead. But no competent evidence appears in the record to sustain such claim, and at the most they acquired only an equity of redemption, which did not include the right of homestead, that right having been released to appellant before they acquired any title whatever. In *McCormick v. Wilcox*, 25 Ill. 274, it is said that "no homestead rights could attach to the premises by making it a homestead after the mortgage was executed." Upon the record before us the order of the Superior Court refusing to appoint a receiver to collect the rents, to be applied under order of the court, and according to its practice in payment of the deficiency decree, is reversed and the cause remanded.

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### Theodore Podolski v. Sol. Friedman & Co.

1. COUNTY COURTS—*No Chancery Powers*.—The County Court has no general chancery jurisdiction or powers, and none are conferred by the act relating to voluntary assignments. In such proceedings it derives its powers solely from the statute.

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Podolski v. Sol. Friedman & Co.

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2. *SAME—Equity Powers Under the Assignment Act.*—There are certain issues as to which the County Court has chancery powers, which are generally conferred by the assignment act. When property has come into the physical possession of an assignee, under the provisions of said act, County Courts have exclusive jurisdiction and power, primarily, to adjudicate and determine the rights of all parties claiming title thereto or an interest therein, and in all questions relating to the disbursement and distribution of any fund in the hands of the assignee.

3. *SAME—When it Has No Chancery Jurisdiction.*—But where the assignee has never obtained actual possession of the property in question, and where the title to such property is claimed by another, who has possession, so far as physical possession is possible, the County Court has no jurisdiction to adjudicate as to such title.

4. *BOOK ACCOUNTS—Involuntary Assignments.*—Where an insolvent assigns his open accounts to one person, and afterward makes an assignment under the statute, for the benefit of his creditors, to another, the first assignee acquires the equitable title to the accounts, and the possession of them so far as possible, and the legal right to enforce the collection of the same by proceedings at law. The County Court has no jurisdiction to adjudicate as to whether the first assignee's title to the accounts is fraudulent, or to determine the relative rights of the different assignees.

*Proceedings Under the Voluntary Assignment Act.*—Appeal from the County Court of Cook County; the Hon. O. N. CARTER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded, with directions. Opinion filed October 27, 1899.

JOHN E. KEHOE, JAMES R. WARD and GEORGE HUNT, attorneys for appellant.

MOSES, ROSENTHAL & KENNEDY, attorneys for appellees, Friedman & Co.

A. BINSWANGER, attorney for A. L. Stone, assignee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

S. Levy & Co. made a general assignment for the benefit of creditors, dated May 31, 1898, and which was that day filed in the County Court of Cook County. June 4, 1898, a petition was filed in said court, which was signed "Sol Friedman & Co.," by their attorneys. Such petition states that appellant has property, assets and effects of Levy &

Co. in his possession which should be delivered to the assignee of said Levy & Co., and that appellant is collecting accounts due and owing to Levy & Co. which belong and should be delivered to said assignee. And such petition prays that appellant may be ruled to show cause why he should not deliver said property and assets to said assignee, and that appellant be restrained from disposing thereof or collecting said accounts, etc. Such petition does not state whether said Friedman & Co. are creditors of Levy & Co., or show any grounds for their interference in said matter. Neither is said petition verified.

Upon the filing of said petition the County Court ordered that appellant answer the same. In each step appellant specially limited his appearance and denied the jurisdiction of the County Court in the matter of said petition. He answered denying the statements made in said petition, and verified the same. Said court, after hearing testimony offered by Sol Friedman & Co., did "order, adjudge and decree" that appellant "forthwith surrender and deliver" the accounts in question to said assignee. From that decree appellant has prosecuted this appeal.

It will not be seriously contended but that, under said petition and answer thereto, and the testimony heard by the County Court, a question is presented which can be determined only by the application of chancery rules by a court exercising chancery jurisdiction. The County Court has no general chancery jurisdiction or powers, and none are conferred by the assignment act. *Ide v. Sayer*, 129 Ill. 230, 235; *Preston v. Spaulding*, 120 Ill. 208, 232; *Atlas Nat. Bank v. More*, 152 Ill. 528, 538.

"The County Court, proceeding under the assignment act, derives its powers solely from the statute." *Hooven v. Burdette*, 153 Ill. 672, 681.

There are certain issues as to which the County Court has chancery powers, which are specially conferred by the assignment act. When property has come into the physical possession of an assignee under the provisions of said act, that court has exclusive jurisdiction and power, primarily, to adjudicate and determine the rights of all parties



claiming title thereto or an interest therein. That is the principle upon which the leading case of *Hanchett v. Waterbury*, 115 Ill. 220, was decided. In that case, as in the prior case of *Freydendall v. Baldwin*, 103 Ill. 329, the property was in the actual physical possession of the assignee. The County Court has such jurisdiction, also, as to the disbursement and distribution of any fund in the hands of the assignee.

But where the assignee has never obtained actual possession of the property in question, and where the title to such property is claimed by another, who has possession thereof, so far as physical possession is possible, the County Court has no jurisdiction in a chancery proceeding to adjudicate as to such title. *Davis v. Chicago Dock Co.*, 129 Ill. 180, 194; *Preston v. Spaulding*, 120 Ill. 208.

The property in question in the case at bar (if we may call it property) consists of open or book accounts—choses in action. Of course the assignee could never take physical possession of them. They had been formally assigned to the appellant by the insolvents, and such assignment had been delivered to him before the making of the assignment by reason of which the County Court acquired jurisdiction. The appellant had thus acquired the equitable title to such accounts, and the possession thereof, so far as that was possible, and the legal right to collect the same and to enforce the collection thereof by proceedings at law. Even if the legal title to said accounts was vested in the assignee, as contended by appellee (as to which we express no opinion), that does not change the rights of appellant. Neither does chancery jurisdiction, for that reason, attach, to determine the question as to whether the title of appellant to said accounts is fraudulent and void. It seems to have been understood by counsel, and by the court below, that said accounts were in the possession of appellant, for the decree provides that he shall “surrender and deliver” them to the assignee. The County Court, however, had no jurisdiction to adjudicate as to whether appellant’s title was fraudulent, and thus to determine the relative rights of the appellant and the assignee. *Davis v. Dock Co.*, *ante* (p. 194); *Pres-*

ton v. Spaulding, *ante* (p. 232); Ide v. Sayer, *ante* (129 Ill. 234).

As between the appellant and the insolvents, said assignments of accounts are valid and binding, so far as this record shows their respective rights. It is contended that such assignments are fraudulent. To determine that question is peculiarly within the province and jurisdiction of a court of chancery.

As counsel have argued at length the question of the jurisdiction of the County Court, as though this was a case between the appellant and the assignee, we have thought it proper to consider the case thus far upon that theory. But the assignee is not a party, either in this appeal or in the County Court. The case before this court is upon the Friedman petition. As stated, that petition does not show that the petitioners have any interest in the matter. In so far as the form indicates the forum, it is a chancery proceeding. The prayer is for relief, such as only a court exercising chancery jurisdiction can grant. The order appealed from says that the court doth "order, adjudge and decree." It was heard by the court without a jury, and without the waiving of the right of trial by jury. It is perfectly apparent that court and counsel all regarded it as being a proceeding in chancery. But as that court had no general chancery jurisdiction, and as no jurisdiction or power was conferred upon it by the assignment act to hear and determine any question or issue such as is here presented, that court had no jurisdiction whatever to entertain said petition or to enter the decree to reverse which this appeal is prosecuted.

A motion was presented to this court by appellees to dismiss the appeal. The disposition of that motion was reserved to final hearing. After what we have said it is unnecessary to speak of that motion further. It is denied.

The decree of the County Court entered in said matter the 12th day of July, 1898, is reversed, and the cause remanded with directions to said County Court to set aside said decree and to dismiss said petition without costs to appellant. Reversed and remanded, with directions.

**John M. Southworth v. The People ex rel., etc.**

1. **PRACTICE**—*In Adjusting Partnership Matters.*—In settling and adjusting partnership matters, it is not necessary to establish the existence of the partnership before ascertaining the location of the fund which is the subject of the litigation, where the bill charges insolvency of the partner, and that the money has been placed in the hands of third parties to prevent recovery.

2. **PARTNERSHIP**—*A Single Adventure is Not.*—The mere joinder in a single adventure, in which the parties are only jointly interested, does not constitute them copartners in such a sense as to oust a common law court of jurisdiction.

3. **PARTNERS**—*Presumption as to Solicitors.*—Where solicitors who are not partners are employed in the same business, by the same clients, the *prima facie* presumption of law is that they are partners as to that particular case.

4. **APPELLATE COURT PRACTICE**—*Correcting Matters of Form.*—It is the duty of the Appellate Court, under the statute (R. S., Ch. 7, Secs. 2, 3), to rectify and amend any defects or imperfections in mere matters of form so that the judgment shall not be reversed or annulled.

**Proceedings for Contempt.**—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed October 27, 1899.

**Statement.**—This is an appeal from an order of the Superior Court adjudging appellant guilty of contempt, and imposing a fine of \$250.

The relator, Armstrong, filed his bill of complaint alleging, *inter alia*, that appellant has received and collected fifteen or twenty thousand dollars, for services rendered by the two jointly, as solicitors in the prosecution of certain claims; that it had been agreed between them and their client that they, as solicitors, should receive jointly half of the amount collected, to be divided between them in equal parts; that for certain reasons it was deemed advisable that Southworth only should appear as attorney of record; that of the amount so received by Southworth he deposited \$12,500 in his bank, and immediately checked out all of that sum but \$722.50; that of the portion so checked out a

part was used to pay Southworth's individual debts; that several thousand dollars were turned over to parties without consideration, of which \$4,260 were drawn out of bank on the day of the commencement of this suit, in order, as it is alleged, that it might be secreted from complainant. The bill charges that appellant is insolvent.

A demurrer to the bill was overruled. Appellant answered, admitting the receipt of \$12,500 as fees for the prosecution and collection of said claims, and that he deposited and has paid it all out except \$722.50. But he denies that Armstrong has any interest in said money, and denies other material allegations of the bill.

W. E. HUGHES, attorney for appellant.

CHAS. H. ALDRICH, attorney for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

The order now appealed from arises out of the refusal of appellant to answer certain questions and furnish certain documentary evidence called for before the master, to whom the case was referred to, to take testimony and report. An order was entered on motion of the relator herein, requiring the defendant, Southworth, to "produce before the master all books, papers, receipts, vouchers, checks, bank books of deposit, as well as all writings of every class and character pertaining to the receipt as well as disbursement of all moneys received by him from McMannomy, or from any source, as solicitor's fees, growing out of the case of McMannomy v. Walker et al., to be used as evidence in this cause, and in doing so that he, Southworth, produce before said master all checks drawn on the Metropolitan National Bank of Chicago by him since the deposit by him of \$12,500 in said bank; any and all receipts or evidences of debt, showing fully and completely to whom said funds were paid, and if any portion of the same is invested, the evidence of such investment if in writing, and if any portion is held in trust, the evidence of such trust if in writing."

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Southworth v. The People.

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Before the master, appellant, Southworth, refused, on advice of his counsel, to produce any of the papers mentioned, on the ground that by his answer he had denied the existence of a partnership and joint undertaking, as set forth in the bill of complaint, and that no evidence had been taken to sustain the bill in that respect, and the main issue had not been determined; that there is an adequate remedy at law for the alleged wrongs complained of in the bill, and that no case has been made, such that the defendant, Southworth, can be compelled to produce any private books or papers at this stage to aid the complainant in presenting his case.

On the report of the master, upon motion of the complainant (relator), a rule to show cause was entered. At the hearing the defendant, Southworth, answered the rule, but his answer was adjudged insufficient, and he was held guilty of contempt.

It is contended that upon the facts stated in the bill, the complainant has a complete and adequate remedy at law. It is true that where only a single transaction is involved persons therein engaged are not necessarily partners. The mere joinder in a single adventure, in which the parties are only jointly interested, does not constitute them copartners in such sense as to oust a common law court of jurisdiction. *Hurley v. Walton*, Adm'r, 63 Ill. 260. Where the transaction embraced only a single venture—the sale of a tract of land belonging to a third person—and no losses or expenses were contemplated or involved, the parties agreeing that each should have one-half of the excess received over the price the owner agreed to take, it was held insufficient to constitute a partnership. *Gottschalk v. Smith*, 156 Ill. 380.

But the alleged agreement in the present case is of a somewhat different nature. The transaction as stated in the bill embraces something more than a single venture in which no losses or expenses are involved. Suits were brought, it is alleged, in New York and Chicago, and apparently the litigation was varied in character and somewhat extended and complicated. The alleged agreement

involved a joint interest of the same nature in the profits, and in the absence of any agreement as to payment of costs or other expenses, if any were incurred, it involved also a joint liability. "A communion of profit implies a communion of loss." *Burgess v. Badger*, 124 Ill. 288-302. This implication of law is in the present case sustained by evidence presented in an affidavit which tends to show that payment of certain costs was contemplated, to be paid by appellant and appellee together. In a letter alleged to have been written to appellee by McMannomy, the client of the alleged copartnership, the latter states that "it is your and Southworth's business to pay these costs;" and he requests appellee, who appears to have collected some money, to send a draft for that purpose to Southworth.

It has been repeatedly held that where solicitors who are not partners are employed in the same business, by the same clients, the *prima facie* presumption of law is that they are partners as to that particular case. *Robinson v. Anderson*, 7 DeGex & Macnaghten, 238. We think that under the facts, as stated in the bill, the court of chancery has jurisdiction.

It is alleged that other grounds of equity jurisdiction exist. (See *Morgan v. Roberts*, 38 Ill. 65.) But we regard the reasons given as sufficient.

But it is insisted by appellant that the proper practice is that the court should first settle the issues of fact and determine the rights of the parties before requiring Southworth to show what he had done with the money in which the appellee claims a half ownership.

The bill, however, substantially alleges that Southworth is insolvent, and that he had placed the money received by him in the hands of third parties in order to prevent its recovery. An application was made for a receiver, but it seems not to have been pressed. What was sought by the inquiry before the master was to fix the location of the fund which is the subject of the litigation. That this is a proper exercise of the power of the court is not, we think, open to serious question. It is one of the common modes of procedure. If the court shall ultimately determine that

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appellee has no interest in the fund, appellant will suffer no serious injury in consequence of being compelled to show where it is. On the other hand, if appellee shall be finally determined to be entitled to any part of it, a decree in his favor would be but a barren judgment if meanwhile the fund in question had been dissipated or lost. We can not accept the view of appellant's counsel that it was first necessary to determine the partnership issue. It is ordinary and proper procedure for a chancery court to hold, by its receiver or otherwise, property which is the subject of litigation, pending the determination of the litigation, where it appears that such course is necessary for the protection of the rights involved. The case of *Hottenstein v. Conrad*, 9 Kan. 435, 440, cited in the brief of appellee's counsel, contains language in point.

It is said that in any event the judgment now appealed from must be reversed, because all fines and forfeitures recovered by law must be recovered by the people, and not by the State of Illinois, which is a geographical description.

The appeal bond is made payable to the people of the State of Illinois. It is the duty of this court under the statute (Rev. Stat. Chap. 7, Sec. 2-3) to rectify and amend any defects or imperfections in mere matters of form, "so that such judgments shall not be reversed or annulled." This is clearly a mere defect in form. The judgment of the Superior Court is affirmed.

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**Fred Clark v. Chicago Title & Trust Co., Receiver of  
the Globe Savings Bank.**

1. CHECKS—*As Assignments of Funds on Deposit.*—A check drawn by a depositor upon a bank in which he has funds sufficient for its payment is an assignment from the drawer to the holder of the check of so much of the fund on deposit. Its presentation for payment fixes the rights of the parties, and the bank has no right thereafter to pay other checks or demands in preference to such check, and a transfer of such

carries with it the title of the amount named therein to each successive holder.

2. **CASHIER'S CHECK**.—*As Evidence of Indebtedness—Preferences.*—A cashier's check, payable to the order of a depositor for the amount of his funds on deposit, is merely evidence of an indebtedness of the bank to the depositor, and does not entitle the depositor to any preference over other creditors of the bank at the hands of a receiver.

**Petition for a Preference.**—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed October 27, 1899.

**Statement.**—Appellant was a depositor in the Globe Savings Bank just previous to its failure. According to the rules of the bank, it could require sixty days' notice of withdrawal of a savings account. Such notice was duly given February 2, 1897. Saturday, April 3, 1897, about five minutes before twelve o'clock, the hour for closing business on Saturdays, appellant called at the bank and received the cashier's check for \$3,000, payable to his (appellant's) order. This check was deposited in another bank, and Monday morning following was thrown out by the clearing house, the Globe Savings Bank having meanwhile gone into the hands of appellee as receiver by appointment of the Circuit Court.

Appellant filed his intervening petition, and claims that the money in question was by the cashier's check assigned to him and set apart as a special fund to be paid on demand that thereafter the bank had no title thereto, and the receiver took the assets subject to appellant's legal right to possession of the fund so set apart. It appears that when the receiver took possession there was cash on hand more than sufficient to pay appellant's check.

The Circuit Court sustained the master's report, holding that the cashier's check was merely evidence of indebtedness of the bank to the petitioner, of no higher character than any other check drawn upon a sufficient deposit, and that appellant was not entitled to any preference.

The relief sought was denied and the petition dismissed. From this order the petitioner prosecutes his appeal.



LYNDEN EVANS, attorney for appellant.

HENRY W. MAGEE, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

A check drawn by a depositor upon a bank, in which he has funds sufficient for its payment, constitutes an assignment and transfer of the right to so much of the fund on deposit from the drawer to the holder of the check. Its presentation for payment fixes the rights of the parties, and the bank has no right thereafter to pay other checks or demands and return dishonored the check so presented. *Munn v. Birch*, 25 Ill. 35. The payee may sue for and recover the amount from the bank, and a transfer of the check carries with it the title of the amount named therein to each successive holder. *Union Nat. Bank v. Oceana Nat. Bank*, 80 Ill. 212.

It is contended in behalf of appellant, in the case before us, that the check drawn upon the Globe Savings Bank by its cashier in favor of the appellant, had the same effect as if it had been drawn against a deposit in another bank; that it "operated precisely as if the money had in fact been drawn out of the bank before" the appointment of the receiver. (See *Bank of America v. Indiana Banking Co.*, 114 Ill. 492.) This might have been more reasonably urged had the check been drawn by the cashier of the insolvent bank against a sufficient deposit in another bank, and presented to the latter for payment before the appointment of the receiver. But if, in such case, the bank holding the deposit had itself failed before presentation or payment, it would scarcely be seriously contended that the holder of the check was entitled to any rights as a preferred creditor, against the bank so failing, merely because he held a check drawn against a fund therein deposited.

There is no substantial basis in this case for the appellant's claim. The drawing of the cashier's check, even if it changed the form of indebtedness, did not change the fact. The Globe Savings Bank was still indebted to the appellant for the three thousand dollars represented by its

cashier's check. There was no change in the nature of the debt. The only change was in the evidence of it. It does not appear that appellant was under any obligation to receive or retain the cashier's check instead of drawing the money at once, nor that he presented the check to the paying teller or made any demand for cash. He voluntarily accepted the cashier's check instead of obtaining cash.

Appellant's counsel insists that "it is not a question of preference. It is a question of title to money—to whom does it belong?" A creditor is entitled to money due him from any debtor. In a sense the money due belongs to him, but that fact does not change—it establishes—the relation of debtor and creditor, and subjects the parties to the rules of law governing that relation. It is urged that the giving of the check "passed the title to the money." That might be so, as has been suggested, had the check been drawn against a fund in another bank as against a claim for the same money by some third party. But as against a bank drawing a check upon itself, no change in title was thereby made. The check was equivalent to an acknowledgment of indebtedness. The payee was entitled to the money before the check was drawn, and he or the holder of the check was entitled to it afterward in the same manner and to the same extent.

A check is not an absolute payment, but a means to procure the money. *Brown v. Leckie*, 43 Ill. 497. It is said in that case that in a suit against the drawer the holder may treat the check as a nullity, and resort to the original cause of action.

The judgment of the Circuit Court is affirmed.

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### Chicago & J. U. T. Co. v. John Mullett.

1. **VERDICTS**—*Conclusive upon Questions of Due Care and Negligence.*—The question as to whether due care was observed by one person and negligence was committed by another, are questions of fact, and when determined by the jury upon conflicting testimony, in the absence of error on the part of the court, must be considered as settled.

**Action in Case, for personal injuries.** Appeal from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed October 27, 1899.

ALEXANDER SULLIVAN, attorney for appellant; EDWARD J. McARDLE, of counsel.

GEMMILL, BAERNHART & FOELL, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The appellee, as plaintiff, recovered a verdict and judgment for \$2,500 against appellant for injuries to his person.

He was riding in a buggy hitched behind a wagon drawn by a horse upon and along West Fulton street, Chicago.

An electric car, belonging to appellant, approached from behind and ran into and overthrew the buggy, thereby causing the injuries complained of.

Appellant, by express statement in the brief in its behalf, relies wholly upon the two points argued by its counsel, that error was committed by the trial court in refusing to give the peremptory instruction to find the defendant not guilty, asked for in apt time by the plaintiff, and that the verdict is against the law and the evidence.

The collision and consequent injuries to plaintiff are not controverted, nor the amount of damages awarded, and no error in respect to other instructions, or in receiving or rejecting evidence, is claimed. The accident happened in the night-time, and it can not be contended that the car was not moving at a high rate of speed, for the motorman having it in charge testified: "We were going very near full speed when I struck it."

Whether the plaintiff was in the exercise of due care, and whether the defendant was guilty of negligence, are the issues argued by appellant.

The theory of the appellant is that the horse and wagon, with the buggy and the appellee behind, came into and upon West Fulton street and the tracks from an intersect-

ing street, suddenly, and so close upon the moving car as to make the collision unavoidable.

There was testimony tending to support such theory, but an equal or greater number of witnesses testified to the contrary, and that plaintiff had traversed West Fulton street for a very considerable distance before the point of the accident was reached.

What the truth is in such respect, and whether due care was observed by the plaintiff, and negligence was committed by defendant, was determined by the jury upon the conflicting testimony of numerous witnesses. We have examined all the evidence the abstract of the record contains, and find no sufficient reason for disturbing the verdict. Nothing remains but to affirm the judgment. Affirmed.

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**Patrick J. Hursen v. City of Chicago, The West Chicago St. R. R. Co. and the Lake St. El. R. R. Co.**

1. NEGLIGENCE—*Bars a Recovery*.—If an accident is occasioned by negligence on the part of the plaintiff he is not entitled to recover, even though the defendants were also guilty of negligence.

2. ORDINARY CARE—*A Question of Fact*.—The question of proper care on the part of the plaintiff is one of fact for the jury, and if there is evidence to sustain their finding, it will not be disturbed.

8. INSTRUCTIONS—*Justifying Reversal and New Trial*.—To justify a reversal and new trial, an instruction must be prejudicial.

**Action in Case, for personal injuries.** Error to the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed October 27, 1899.

E. S. CUMMINGS, attorney for plaintiff in error.

ALEXANDER SULLIVAN, attorney for the West Chicago Street Railroad Company; EDWARD J. McARDLE, of counsel.

KNIGHT & BROWN, attorneys for the Lake Street Elevated Railroad Company.

MILES J. DEVINE and MATTHEW P. BRADY, attorneys for the City of Chicago, defendants in error.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is an action to recover for personal injuries. The plaintiff in error was driving upon Lake street, Chicago, across the tracks of the Chicago & Northwestern Railway Company, at a point of intersection of said street with the railroad, when his wagon was upset by some obstruction and he was thrown out, receiving the injuries complained of. His contention is that the accident was caused by a pile of snow and ice created by the West Chicago Street Railroad Company, and augmented by water dripping upon it from the Lake Street Elevated Railroad and freezing. He states that he did not see the obstruction; that it was between five and six o'clock in the evening, and was dark.

Just previous to the accident the plaintiff had turned out of the track to get ahead of other teams waiting at the crossing for the gates to open, and the accident occurred directly upon the crossing between the gates.

There is evidence that the forward wheels ran upon this pile of snow, thus upsetting the wagon; and that the obstruction had been in that place for a week or ten days. This is the testimony of a police officer of the city, who also testifies that it was made up of snow swept off the street by the street car company and augmented by drippings from the elevated road, and that it was very icy at the time of the accident.

The jury returned a verdict for the defendants. It is urged in behalf of plaintiff in error that this verdict should be set aside as manifestly against the weight of evidence, and that the trial court erred in giving improper instructions.

Plaintiff's counsel argues that "there is no evidence that plaintiff in error saw the pile of snow and ice, or knew that it was there." That may be true, but the question is not merely whether he saw it, but whether in the exercise of ordinary care he ought to have seen it, and avoided the

accident. One of his witnesses states that at the time the accident occurred he saw the pile from a distance of at least one hundred and twenty feet. The jury were warranted in concluding from this testimony that if the witness could and did see the pile of snow, under the circumstances plaintiff in error ought, in the exercise of ordinary care, to have seen it also, in season to avoid running onto it. The place was one—a railroad crossing—where at all times the exercise of care and caution is called for. If the accident was occasioned by negligence on the part of the plaintiff, then he is not entitled to recover, even though the defendants were also guilty of negligence. The question of proper care on the part of the plaintiff was one of fact for the jury, and there is evidence to sustain their finding.

“It can scarcely be repeated too often that the judge and jury who try a case in the court below have vastly superior advantages for the ascertainment of truth and the detection of falsehood over this court sitting as a court of review.” *Calvert v. Carpenter*, 96 Ill. 67.

It is contended that the trial court erred in giving improper instructions. The instructions complained of stated in substance that under the evidence in this case the knowledge of a city policeman of the existence of the alleged obstruction was not sufficient notice to the city. Whether this instruction be deemed erroneous or not it is sufficient to say that it is not every error in an instruction which will justify a reversal and a new trial. It must appear to have been prejudicial. *Dacey v. The People*, 116 Ill. 555-576, and case there cited.

If the jury found from the evidence, as they might have done, that the accident occurred in consequence of the negligence of plaintiff in error in not looking out for and avoiding the obstruction, which it appears from the evidence was clearly visible, then the question of notice to the city was unimportant, and the instruction could not have been prejudicial.

We find no sufficient ground to justify this court in setting aside the verdict and judgment entered thereon.

The judgment of the Superior Court must be affirmed.

**Siegel, Cooper & Co. v. The People, etc.**

1. *SCIENTER*—In *Criminal Prosecution*.—As a general proposition, a criminal intent must be shown before a conviction of a criminal offense will be sustained.

2. *SAME*—*Prosecution Under the Pharmacy Act*.—In prosecutions for violation of Sec. 33, Chap. 91, R. S., for selling adulterated drugs, medicines, chemicals or pharmaceutical preparations, the *scienter* must be proven to justify a conviction.

**Prosecution under Sec. 33, Chap. 91, R. S.**—Appeal from the Criminal Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1899. Reversed and remanded. Opinion filed October 27, 1899.

A. BINSWANGER, attorney for appellant.

To sustain a conviction for the offense charged in this case, the sale, if any were made, must have been willful, and with an intent on the part of the vendor to deceive or defraud the purchaser. Sec. 16, Par. 35, Chapter 91, S. & C. Ann. Stat.

Penal statutes are to be construed strictly and can not be extended by construction. *Raplee v. Morgan*, 2 Scam. 561; *Edwards v. Hill*, 11 Ill. 23; *Erlinger v. Boneau*, 51 Ill. 95; *City of Chicago v. Rumpff*, 45 Ill. 90.

Penal statutes require that where an act contains such an ambiguity as to leave reasonable doubt of its meaning, it is the duty of the court not to inflict the penalty. *Endlich on Construction of Stat.*, 1 Par. 330; *Commonwealth v. Standard Oil Co.*, 101 Pa. St. 119–150; *Hines v. R. R. Co.*, 95 N. C. 434; *U. S. v. Lacher*, 134 U. S. 624.

A statute which awards a penalty not known to the common law, and is in a high degree penal, will be limited to such cases as are clearly within its terms. *Commonwealth v. Phillips*, 11 Pick. 27; *Ibid v. Martin*, 130 Mass. 465.

KIRT GOULD, attorney for appellees; GABRIEL J. NORDEN, of counsel.

"Penal statutes are to be fairly construed, according to the legislative intent, and the latter should prevail." To this effect are the following cases, among others, cited by appellant: *United States v. Morris*, 39 U. S. 464; *United States v. Wiltberger*, 18 U. S. 76; *United States v. Lacher*, 134 U. S. 624; *Hines v. R. R. Co.*, 95 N. C. 434; *Sedgwick on Const. Stat.*, 324-334; *Hankins v. People*, 106 Ill. 634-5; *Reineke v. People*, 15 Ill. App. 241.

It is always to be assumed that the legislature intended its enactments to be effective, not invalid, and therefore construction should aim to support, not defeat it. *Cooley's Blackstone*, p. 61 Intro. (Note.)

If a statute is remedial in its character, and where the language is doubtful or will bear two constructions, in promotion of the object of the general assembly the courts will give such an interpretation as to best promote the remedy. *Ry. Co. v. Heflin*, 65 Ill. 367.

It is said: "In giving constructions to words in a statute many things are to be kept in view, such as the object and purpose of the act, the connection in which they are used, and the consequences that will probably result from the proposed construction." *Gormley et al. v. Uthe*, 116 Ill. 647.

The court says: "No court should adopt a construction of the law which would involve consequences of this character (practical immunity from all penal consequences of a heinous offense) unless forced to do so by considerations which are unsurmountable." *Watt v. People*, 126 Ill. 17.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This is a proceeding against appellant for an alleged violation of Sec. 33, Chap. 91, *Hurd's Rev. Stat.* August 5, 1897, Walter H. Green, as a representative of the State Board of Pharmacy, purchased at the store of appellant a one pound package of borax, for the purpose of ascertaining whether it was adulterated. Soon afterward he purchased other packages of borax there. The package purchased August 5th he says was adulterated. The other packages were



not. Upon the trial in the court below appellant was adjudged to be guilty and a fine of \$50 was imposed. That part of said section which it is contended was violated by appellant is as follows :

“ No person shall add to or remove from any drug, medicine, chemical, or pharmaceutical preparation, any ingredient or material for the purpose of adulteration or substitution, or which shall deteriorate the quality, commercial value or medicinal effect, or which shall alter the nature or composition of such drug, medicine, chemical or pharmaceutical preparation, so that it will not correspond to the recognized tests of identity or purity. Any person who shall thus willfully adulterate or alter, or cause to be adulterated or altered, or shall sell or offer for sale any such adulterated or altered drug, medicine, chemical or pharmaceutical preparation, or any person who shall substitute or cause to be substituted, one material for another, with intention to defraud or deceive the purchaser, shall be guilty of a misdemeanor, and be liable to prosecution under this act.”

Appellant was selling only such borax as it purchased from the Pacific Borax Co. The package purchased by the witness Green, August 5th, was purchased by appellant from that company. The manager of that company testified that his company sold to appellant only pure borax. About forty tests were made by appellant, from time to time, of the borax purchased by it of said company, in each instance the result showing that it was pure. There is no evidence tending to show any intent on the part of appellant, or of any one representing it, to do anything which would be a violation of said statute. It is therefore important to consider whether the *scienter* must be proven to justify a conviction under this section.

As a general proposition, intent must be shown before a conviction of a criminal offense will be sustained. To this general rule there are some exceptions under provisions of the statute, such as selling or giving intoxicating liquor to minors, Stat. of Ill., Ch. 43, Sec. 6; a banker receiving deposits when insolvent, Ch. 38, Sec. 25a; conversion of proceeds of sale by commission merchants, Sec. 78; attorneys and others failing to pay over money collected, Sec. 79;

loaning public funds by public officer, Sec. 81. In none of those cases is the act unlawful except by virtue of the statute. And in neither of those sections is there any qualifying words, such as willfully, knowingly, fraudulently, unlawfully, with intent to defraud, etc.

In the same chapter of the statute, containing the section under which this conviction was had, are sections which may be construed as not requiring proof of intent. Section 20 provides a penalty for employing persons other than registered pharmacists to compound drugs, etc., and section 31 provides a penalty for selling at retail any drug without affixing a label bearing the name of the article. In neither of these sections is there any mention of intent or anything of similar import. But section 32 provides that whoever shall *willfully* make false representation, etc., shall be liable to a penalty.

The section of the statute under which this conviction was had provides that the act complained of must have been "willfully" committed, "with intention to defraud or deceive." No amount of refinement under grammatical rules, neither any technical construction, can take from this section the expressed will of the legislature that the party complained of must have purposely, not accidentally, violated its provisions. We say this, recognizing the rule that a penal statute must be strictly construed, but at the same time recognizing also the duty of the court in construing a statute to seek to ascertain the will of the legislature.

The conviction in this case was based entirely upon the testimony of the witness Green. The trial court should have permitted appellant to show what interest, if any, that witness had in the result of the suit.

It may be that the trial court erred, also, in permitting that witness to testify, or at least to refresh his recollection by referring to a *copy* of a memorandum made by him. But we have deemed it best to base our opinion upon a construction of the statute for the alleged violation of which the conviction was had.

For the reason indicated the judgment of the Criminal Court is reversed and the cause remanded.

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**Samuel Williams, use of, etc., v. West Chicago St. R.  
R. Co. and R. M. Wing.**

1. **ASSIGNMENT—*Delivery is Essential.***—An assignment of a judgment is not valid and enforceable as against third parties without a delivery of the assignment to the assignee, or to some one authorized by him to accept it.

**Garnishment and Interpleader.**—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded, with directions. Opinion filed October 27, 1899.

**Statement.**—Appellant, having obtained a judgment against Samuel Williams for the sum of \$197.84, caused a garnishee summons to be issued by a justice of the peace and served upon the appellee railroad company October 27, 1897. The railroad company answered, stating that it was not indebted to said Williams, other than by virtue of a judgment rendered against it and in favor of said Williams October 26, 1897, for the sum \$3,000; that it had also been served as garnishee with a writ issued out of the Circuit Court of Cook County, in which the amount claimed was \$1,814.86, and that October 28, 1897, it received notice of an assignment of said judgment to the appellee Wing. The appellee Wing, as an interpleader, filed his verified plea, stating that said judgment for \$3,000 and the money due thereon were his. In the justice court a judgment was entered in favor of appellant, from which an appeal was taken to the Circuit Court by said interpleader.

Upon the trial in the Circuit Court it also appeared that Howard E. Leach, a law partner of said Wing, prepared said assignment to said Wing, and at the same time also prepared an assignment, which by its terms assigns a one-half interest in said judgment for \$3,000 to George S. Williams (who is a son of said Samuel Williams); that said Samuel Williams executed and acknowledged both of said assignments at the same time, and also at the same time gave

them both to said Leach; that said George S. Williams was not present at the time said assignment to him was prepared, or when it was executed, or when it was given to said Leach, and that it remained in the possession of said Leach up to the time of the trial of this cause in the Circuit Court. It does not appear that said George had any knowledge of the execution of the assignment to him, or that he knew said Leach had such assignment in his possession, or that he ever authorized said Leach to accept the same for him. It does not appear that said George ever heard that such an assignment was to be or had been made. The Circuit Court found the issues in favor of said Wing, and that he was the owner of all the moneys in the hands of said garnishee, and entered judgment accordingly.

FRED H. ATWOOD and FRANK B. PEASE, attorneys for appellant.

WING & CHADBOURNE, attorneys for appellees.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

Upon the trial of this cause it appeared that an agreement was made between said Samuel Williams and the firm Wing, Chadbourne & Leach, wherein it was provided that said firm should receive one-half of the amount recovered in the suit in which said judgment for \$3,000 was entered, as compensation for their legal services therein. Neither said Wing nor his firm have any interest in said judgment or the assignment thereof, to said Wing, except to secure to said firm said undivided one-half thereof. They do not claim anything more for themselves.

Mr. Wing testified that the morning said assignment to him was made, and at an interview between Samuel Williams, Mr. Leach and himself, he said to Mr. Leach, "Make out an assignment from Williams of that whole judgment to me, and half of it will be for our firm and the other half I will hold for George."

Samuel Williams says that he owed his son George "pretty

near \$1,800," and that he "agreed with George S. Williams before the case was tried to give him half of it." George S. Williams says that October 26, 1897, his father owed him \$1,800. He makes no statement whatever as to the judgment or any assignment thereof, or when, if at any time, he had any knowledge of any such assignment, or that he claimed anything under it. He does not appear or interplead, and is not before the court except as a witness.

If, therefore, the judgment in this case be affirmed, it must be upon the strength of the assignment to Mr. Wing. But he says that neither he nor his firm are entitled to or claim anything more, in his or their own right, than one-half thereof.

Said assignments must be construed together. Assuming, for the purposes of this case, that as to one-half of said judgment the assignment thereof to said Wing is valid, there remains the other one-half, and of this there are two assignments. It was evidently the intention of said Samuel Williams, at the time he executed said assignments, to assign to his son George all that remained of said judgment after the receipt by said Wing, Chadbourn & Leach of the amount due them. This appears from the fact that in the assignment to George S. Williams is this statement, viz.: "This assignment is subject and secondary to an assignment this day made of the said judgment to R. M. Wing."

Mr. Wing must have so understood it at the time, because in his notice to the railroad company, served October 28, 1897, is this statement, viz.:

"You will further take notice that said assignment was taken by me to secure an undivided half interest in said judgment, which is due me for legal services in obtaining said judgment, and to secure me for any money it may be necessary for me to advance, in the event of further litigation on appeal from such judgment, or otherwise, and that the balance of said judgment is held by me in trust for George S. Williams, in pursuance of an assignment of an undivided half interest in said judgment, made on said October 26, 1897, by said Samuel Williams to said George S. Williams."

That notice was prepared within two days of the time that said assignments were made, while the facts were fresh in mind. By that it appears that although the whole of said judgment was assigned to said Wing, not only to secure the one-half thereof claimed to be due for legal services, but to secure the repayment of any money that it might be necessary to advance in case of an appeal from such judgment, or otherwise, said notice also says that the balance of said judgment—not one-half thereof—is held in trust for George S. Williams, “in pursuance of” the assignment to him. It was undoubtedly the purpose of the parties to secure to said Wing, or through him to his said firm, one-half of said judgment, and any money which might be advanced as indicated, and said assignment to Mr. Wing of the whole of said judgment was in the nature of a pledge for that purpose. If no assignment of “the balance” had been made to George and the claims of no other parties had intervened, then Mr. Wing would have had to pay such balance to Samuel Williams. It was to secure to George this balance that the assignment to him was made. That was made “subject and secondary” to the Wing assignment, because it was then uncertain what amount might be due to said Wing (or his firm) if said cause should be appealed. But whatever that balance might be, Mr. Wing no doubt stated the rights of the parties correctly when he said to the railroad company in his notice that he held such balance in trust to be paid to said George, “in pursuance of” said assignment to said George.

Mr. Wing is not entitled to retain such balance in his own right or for his said firm. He does not claim that he is. Who, then, is entitled to such balance? Said George S. Williams is not here claiming it. No one in this case represents him claiming under assignment to him. Under the facts, as they appear in this record, said assignment to him is not a valid and enforceable assignment as against third parties. To make it valid it must have been delivered to him or to some one authorized by him to accept it. There was no such delivery. Mr. Wing’s trust is to pay or deliver

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said balance "in pursuance of" this assignment. As this is not a valid assignment, said balance is, in law, the property of said Samuel Williams, subject to garnishment in the interest of his judgment creditors.

Attorneys for appellant submitted to the trial court this proposition, which was held to be the law by that court, viz.:

"First. The court holds, as a proposition of law in this case, that the delivery of an assignment of judgment to the assignee thereof is essential to its validity, and that the assignment of judgment from Samuel Williams to George S. Williams, offered in evidence in this case, gave said George S. Williams no right or interest in said judgment as against the plaintiffs, Walter Shoemaker and Charles D. Bull."

But as appellee Wing held the balance in his hands "in trust for George S. Williams, in pursuance of" said assignment to said George, it was error to hold that said Wing "was the owner of the moneys held by and in the hands of the garnishee."

There is no evidence tending to sustain the statement in the answer of the railroad company, that it had been served with any garnishee summons other than the one in this case.

The judgment of the Circuit Court is affirmed, except as to the claim of appellant, and as to that claim said judgment is reversed and said cause remanded. Said Circuit Court will enter judgment in said cause in favor of appellant Samuel Williams, for the use of said Shoemaker and said Bull, and against said railroad company as garnishee. Such judgment so to be entered shall be for the amount due to said Shoemaker and Bull at the time of the entry thereof, upon their judgment against said Samuel Williams, including interest and costs.

Affirmed in part, and reversed and remanded in part, with directions.

**Hart & Cooley Mfg. Co. v. John Tima, a Minor, by His Next Friend.**

1. **PRACTICE**—*Power of Court to Set Aside Its Orders and Enter Others.*—Where a case is properly on the docket for the purpose of settling a bill of exceptions, and the term has not ended, the court has the power to set aside the orders which it has made during the term and enter others.

2. **MASTER AND SERVANT**—*Employer Not Bound to Furnish Safest Machinery.*—The employer is not bound to furnish for his workmen the safest machinery, nor to provide the best methods for its operation, in order to relieve himself from responsibility for accidents resulting from its use. If the machinery is of ordinary character, and such as can, with reasonable care, be used without danger to the employe, it is all that is required.

3. **ORDINARY CARE**—*In Providing Suitable and Safe Machinery.*—The law imposes upon the employer only the obligation of using reasonable and ordinary care and diligence in providing suitable and safe machinery for the use of his employes.

**Action in Case, for personal injuries.** Appeal from the Circuit Court of Cook County: the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Mr. Justice SHEPARD dissenting. Opinion filed October 27, 1899.

**Statement.**—This is a suit to recover for personal injuries. The appellee—at the time of the injury complained of about sixteen years of age—was employed at the works of the appellant, in pickling steel. This process involved the placing of strips or pieces of steel to be treated, upon a rack some twelve or fourteen feet in length, which was done by appellee and two young men working with him. To this rack were attached, by double iron or steel hooks, a block and tackle, by which the boys raised the rack high enough to pass over tubs containing the liquid used for pickling. These tubs or vats were four in number, each about two and a half feet deep, three feet wide and about seventeen or eighteen feet long, and were about eighteen inches apart, thus affording space for passage between them. The first two were filled with hot water containing acid, the third with hot water, and the fourth contained lime for



drying the steel. The tackle was attached from above to a support moving on wheels, and when elevated to a sufficient height the rack could be shoved along to its position over the proper tub in which the steel was to be immersed. When in the proper position the boys were accustomed to lower the rack containing the steel into one of the tubs by means of the pulleys and chain connected with the block and tackle. After remaining there a sufficient time it would be lifted in the same manner and pushed to the next tub, and so on until the process was completed. It would then be hoisted in the same manner, and run off into another department.

It is claimed by appellee that, in order to push the rack along over the tubs, it was often necessary for the boys to climb on top of the tubs. This was, however, one of the points in dispute.

When the accident occurred the appellee was standing upon the edge of the first tub, and he and his fellow-employee were pushing the rack over to the second tub, when one of the hooks connecting the block and tackle with the rack containing the steel broke, and appellee was thrown into the liquid, receiving the injury complained of, his left arm especially being quite severely burned by contact with the hot water and acid.

It is claimed on the part of appellee that the hook, the breaking of which caused the accident, was inadequate and unsafe. Appellant insists that the hook was broken by the negligence of the boys themselves in forcing the rack against the edge of the tub.

SCHUYLER & KREMER and D. J. & D. J. SCHUYLER, JR.,  
attorneys for appellant.

SETH F. CREWS and RALPH CREWS, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

A motion was made by appellee's counsel to strike out the bill of exceptions in this case from the record. It is

claimed that it was not filed within the time allowed for that purpose.

It appears that the original time expired with September 7, 1898. September 6th a stipulation was signed by appellee's counsel, consenting to an extension of ten days from September 8th. Upon the 9th of September an order of court was entered, extending the time ten days from September 8th, in accordance, apparently, with the stipulation. The case was properly on the docket of the September term for the purpose of settling the bill of exceptions. The court, acting judicially, signed the bill and it was filed during the same term. "The term had not ended, and the court had the power to set aside the orders which it had made at the same term and enter others." See *Plotke v. Chicago Title and Trust Co.*, 175 Ill. 234. The motion to strike the bill of exceptions from the record must be denied.

It is contended by appellant that at the time of the accident the plaintiff was in the employment of an independent contractor, and that the appellee owed him no duty.

It was for the jury to determine whether the proof sustained this contention. There is evidence tending to show that appellant had contracted with one Henry Morgan to do the pickling of the steel at the establishment. The entire pickling plant appears to have been furnished by the appellant, and apparently was kept by it in repair. Morgan says the company furnished everything except the men. There was evidence that the employes of that department were paid at the office of the company on the regular company pay day.

Whether Morgan was in reality an independent contractor, or only nominally so, was a question of fact, and the jury having passed upon the question, we find no warrant for disturbing their verdict in that respect in the record before us.

It is, however, insisted by appellant's counsel that the record fails to disclose any negligence causing or contributing to the injury on the part of appellant. If this is so, then the verdict and judgment are erroneous and must be set aside.

Appellee's counsel urge, as ground for sustaining the judgment, that the law imposed upon the defendant company the duty to supply the servant with a reasonably safe place and appliances with which to perform his task; and that "the negligence was on the part of the defendant in failing to furnish reasonably safe machinery." Their contention, as stated in their brief, is "that the whole record is full of evidence that the hook furnished was entirely inadequate and absolutely unsafe, and the accident, occurring as it did, amounts to an absolute demonstration that the appellants and their agents were guilty of great negligence in furnishing unsafe appliances and machinery."

It seems to be conceded by both parties that the cause of the injury was the breaking of the hook. "Everybody admits," say appellee's counsel, "that it was the breaking of the hook furnished by the defendants to Morgan which caused the injury to the plaintiff." It is necessary then, if the appellee is to recover, that there should be some evidence, at least, tending to show that the breaking of the hook was caused by negligence on the part of appellant or its servants.

The first evidence of negligence, according to appellant's counsel, is "the absolute positive fact that it was not sufficient because it broke with the load upon it." It is needless to say that it does not necessarily follow, from the fact that the hook broke, that the breaking was due to appellant's negligence. Indeed, it is contended by appellant that the fracture of one arm of the hook, and other circumstances in evidence, tend to show that the hook was broken because the rack was carelessly and forcibly shoved against the tub by appellee and his fellow-workman.

The second ground alleged as sustaining the charge of negligence is that the hook was overloaded at the time of the accident.

The hook in question was a double hook, and the witness Hart testifies that ordinarily there was put on the racks an average of one thousand pounds of steel at a time. There is a conflict of testimony as to the weight of steel upon the

rack at the time of the injury. Appellee and his fellow-employee, who was working with him at the time, say that they put about eighty-four pieces of steel on the rack, and appellee says these weighed from thirty-five to thirty-nine pounds each. Appellee elsewhere says the weight was two thousand pounds. Morgan, who had charge of the department, testifies that the load on the rack when the hook broke was about nine hundred pounds, and the number of pieces or strips of steel about eighteen. He stated that he had himself that morning hoisted 1,410 pounds with the apparatus under consideration. The man who weighed the steel for the boys says the steel on the rack at the time of the accident weighed about a thousand pounds, and that the largest load ever placed on the rack before the accident was about fifteen hundred pounds.

Whatever the fact may be as to the weight at the time of the accident, it appears from appellee and his witnesses, that he, and his associates in the particular work he was doing, loaded the rack themselves and in their own way, and if the rack was, as appellee claims, overloaded, it was by the voluntary act of himself and his fellow-servants, who were working together. Appellee's testimony is that after the steel to be pickled had been weighed, he "handed it to Frank and Joe and they pulled it on the rack." Morgan testifies that he told appellee "to be sure to load the racks a certain weight. We never went over between eight hundred and nine hundred pounds. Sometimes, if I handled it myself, I used to go over." His testimony in this respect seems to be uncontradicted. If appellee disregarded instructions, and overloaded the rack, it is difficult to see how his negligence in this respect can be chargeable to appellant.

But it is said that there was expert testimony tending to show that the hook was inadequate and defective for the work in which it was used. The witness Wade, indeed, testifies that the hook in controversy was not constructed on the principle of standard hooks, such as may be found in all chain and tackle blocks in the market. But the "em-

ployer is not bound to furnish for his workmen the safest machinery nor to provide the best methods for its operation in order to save himself from responsibility from accidents resulting from its use. If the machinery be of an ordinary character, and such as can, with reasonable care, be used without danger to the employe, it is all that can be required from the employer." C., R. I. & P. R. R. Co. v. Lonergan, 118 Ill. 48. The hook in question was new and of the same character as those which had been used in the same service for more than three years. This is the uncontradicted evidence.

The witness Wade further says that these double hooks would stand a pressure of weight of twenty-five hundred pounds, and that "with a resisting capacity of twenty-five hundred pounds on both these hooks, it would not be safe for a weight of nine hundred or twelve hundred pounds. My calculations are based upon the size of this rod," meaning apparently the bar which was supported by the hook. He says the size of the iron would sustain, tensile strength simply, a load of four thousand pounds, but not as a hook. Disregarding the testimony of appellant's expert witnesses on the subject, it is the uncontradicted testimony of the superintendent that the same kind of a hook, and the same size of iron, had been in use ever since he had been in that department—more than three years. If, as the expert, Wade, seems to conclude, it was not safe for a weight of nine hundred or twelve hundred pounds, there is no evidence tending to show that appellee had any reason to suppose it to be unsafe, but, on the contrary, abundant reason, drawn from long experience, to believe that it was entirely adequate for the work required of it. It is in evidence that this iron hook stood a test of 4,000 pounds.

We regard the evidence as entirely failing to show any negligence on the part of appellee in the use of the hook in question.

"The law imposes upon the employer only the obligation to use reasonable and ordinary care and diligence in providing suitable and safe machinery. The machinery is

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not required to be the best or most approved kind, or to be absolutely safe. It is sufficient that it was reasonably safe." *Camp Point Mfg. Co. v. Ballou*, Adm'r, 71 Ill. 417-421; *I. B. & W. Ry. Co. v. Tov*, Adm'r, 91 Ill. 474; *Consolidated Coal Co. v. Scheiller*, 42 Ill. App. 619.

The judgment must be reversed and the cause remanded.

MR. JUSTICE SHEPARD dissenting.

I can not agree with the result. It seems plain to me that there was sufficient evidence upon both questions of negligence by appellant, and of due care by appellee, to go to the jury, and that their verdict should conclude us.

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### North Chicago St. R. R. Co. v. Lambert Kaspers, a Minor, by His Next Friend.

1. NEGLIGENCE—*What Is Not*.—It is not negligence *per se* to board a cable car while it is in motion.

2. SAME—*Question of Fact for the Jury*.—Whether it is negligence to board a cable car while in motion, is a question of fact for the jury to determine from all the evidence in the case.

3. VERDICTS—*When They Will Not Be Set Aside*.—Where there is competent testimony, fairly tending to sustain a verdict, courts will not set it aside solely because it seems to be contrary to the weight of evidence.

**Action in Case, for personal injuries.** Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed October 27, 1899.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

FRANCIS J. WOOLLEY, attorney for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This is an action to recover damages for personal injuries

alleged to have been sustained by appellee through the negligence of appellant.

The judgment and the verdict thereon are for the sum of \$5,000. It is contended by counsel for appellant that such judgment is excessive. At the time of the injury appellee was fourteen and one-half years old. He suffered a compound comminuted fracture of his left leg, about two or three inches above the ankle. Some pieces of the bone of the leg are gone. As a result of the injury the left foot is carried inward, so that in walking the weight would come upon the outside of the foot—the left leg is from half an inch to an inch shortened—and the use and action of that foot is limited. Appellee was confined in the hospital thirteen weeks, and for some time thereafter had to use crutches. He suffered great pain, and the leg was weak and still was painful at the time of the trial, over two years after the injury.

It was not an ordinary simple fracture of the leg. We can not say, under the facts and the circumstances of this case, that the verdict is so excessive as to warrant a reversal of the judgment by this court.

It is also urged by appellant that the verdict and judgment are contrary to the evidence. It appears that appellant operated a line of street railway, in one part of which the motive power was electricity, transmitted by an overhead wire, the cars being called trolley cars, and in the other part the motive power was steam, transmitted by an underground cable, the cars being called cable cars. Appellee was first upon the trolley car, where he paid his fare and received a transfer ticket for the cable car. When appellee was passing from the trolley car to the cable car at the point of transfer, and when he was about twenty feet from it, the cable train started. Appellee ran to get upon it. He not only ran the twenty feet, but ran the length of three cars, in the same direction the train was moving, and got upon the front end of the third car from the rear in the train. The train must have been, it was, moving very slowly. Appellee having got upon the step at the front

end of the car, and just as he was stepping therefrom upon the front platform, there was a "sudden jerk," by which he was thrown back and off the car. He was a passenger and entitled to the rights and protection due to a passenger. He was injured by being thrown from the car to the street pavement.

It is not negligence *per se* to board a cable car while in motion. (Cicero St. Ry. Co. v. Meixner, 160 Ill. 320, 325.) It is a question of fact for the jury to determine from all the evidence in the case.

In N. Chicago St. Ry. Co. v. Wiswell, 168 Ill. 613, 615, Mr. Chief Justice Phillips, speaking for the court, says:

"In large and populous cities, where cars are constantly receiving and discharging passengers at crossings, it is a well-known fact that many of such passengers board cars and alight therefrom before such cars have come to a full stop, and that they do so usually with perfect safety. It is well known, also, that street car companies tacitly invite many passengers to board and alight from their cars by checking up to a slow rate of speed, and immediately starting up at a greater speed when the passenger is safely aboard or has alighted. It would be impossible for a court to lay down a rule as to what particular rate of speed would be sufficient notice to a passenger that if he attempted to get on or off he would be guilty of contributory negligence. It would also be a great hardship, and unjust, to lay down a general rule that a passenger attempting to board a street car while in motion at all should be held in contributory negligence."

The same may be said as to getting on or off at the front end of a street car or being upon the front platform. Whether appellee was guilty of contributory negligence, or was in the exercise of ordinary care, and whether appellant by its employes, was guilty of negligence which caused the injury complained of, when the testimony is conflicting, are questions of fact for the jury. It is the well-settled law in this State that where there is competent testimony, fairly tending to sustain the verdict, courts will not set aside the finding of the jury solely because it seems to be contrary to the weight of evidence. The verdict for appellee in this case is not "so overwhelmed by opposing evidence" that



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this court can say that it "is so glaringly wrong" that we have a right to disturb it.

It is also urged on behalf of appellant that the trial court erred in the admission of testimony and in instructing the jury. After a careful examination of the record we are of opinion that these objections are not well founded.

Appellee was permitted to show the usage at the point of transfer where he was injured, as to passengers getting upon the cars while they were slowly moving, etc. There was no error in this under the facts and circumstances of the case.

These questions, as they appear in this record, are such that it can be of no value outside of this case for this court to consider them at length.

Perceiving no error which would justify a reversal in this case, the judgment of the Superior Court is affirmed.

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West Chicago St. R. R. Co. v. Caroline Raftery.

85	319
85	377
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112	1423

1. *INSTRUCTIONS—Must be Predicated upon the Evidence.*—The mere fact that a witness is an employe of a party to a suit is not sufficient to sustain an instruction which says that "if the jury believe from the evidence that any witness has testified under a fear of losing his employment; from a desire to avoid censure; from a fear of offending; or from a desire to please his employer—then such fact may be taken into account by the jury in determining the degree of weight to be given to the testimony of such witness."

2. *SAME—The Testimony of One Credible Witness Entitled to More Weight than the Testimony of Many Others.*—An instruction which states that the testimony of one credible witness is entitled to more weight than the testimony of many others is faulty, as instructing the jury that the testimony of such a witness is entitled to more weight than the others upon the theory that such other witnesses have knowingly testified untruthfully, without limiting such untruthfulness to facts or questions material to the issue.

**Action in Case, for personal injuries.** Appeal from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed October 27, 1899.

ALEXANDER SULLIVAN, attorney for appellant; EDWARD J. McARDLE, of counsel.

BRICKWOOD & WALKER, attorneys for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This suit was brought to recover damages for personal injuries suffered by appellant by reason of alleged negligence on the part of appellee, by its servants, in operating a trolley street car in the city of Chicago. By reason of the opinion entertained by this court as to certain instructions given to the jury by the trial court, it is not necessary to enter at length into any review of the facts appearing in the record.

Appellee's seventh instruction, given by the court, is as follows, viz. :

Seventh. "If the jury believe from the evidence that any witness has testified under a fear of losing his employment, or a desire to avoid censure, or a fear of offending, or a desire to please his employer, then such fact may be taken into account by the jury in determining the degree of weight which ought to be given to the testimony of such witness; and in such case the jury have a right to judge of the effect, if any, likely to be produced upon the human mind by such feelings or motives, and how far such feelings or motives on the part of the witness may tend to warp his judgment or pervert the truth; and the jury, after applying their own knowledge of human nature and of the philosophy of the human mind to the investigation of this subject, are to judge of the weight which ought to be given to the testimony of such witness, taking the same in connection with all the other evidence in the case."

"But nothing contained in any instruction is to be regarded by the jury as intended to reflect upon any witness or intimate any opinion upon the facts. The jury are to determine all such matters by the evidence alone."

This instruction says that "if the jury believe from the evidence that any witness has testified " (1) under a fear of losing his employment; or (2) from a desire to avoid censure; or (3) from a fear of offending; or (4) from a desire to please his employer—then "such fact may be taken into account

by the jury in determining the degree of weight to be given to the testimony of such witness."

Counsel for appellant says in his argument that there is not a particle of evidence to support this instruction. That statement is not challenged by counsel for the appellee in their argument. Our attention has not been directed to any testimony of the kind, nor have we observed any in this record. If there be no evidence to support these four points, or any or either of them, it was error to give this instruction. When a court, in an instruction, says to the jury that "if they believe from the evidence" any particular thing, the court at least intimates to the jury, and the jury may, and probably would, understand it to be the opinion of the court that there was some evidence as to the thing referred to.

The mere fact that a witness is an employe of a party to a suit is not sufficient to sustain such an instruction. It can not be assumed, from that fact alone, that either one of the four conditions named in this instruction exists, or would influence the witness to be otherwise than truthful.

A great majority of the men of this country are employes. Such men are just as truthful as their employers. It would be in isolated cases only, if at all, that such a man would commit perjury, or that his judgment would be so warped as to cause him to testify to that which is not absolutely true, simply because he is an employe.

It is urged by counsel for appellee that this instruction was approved in *Central Warehouse Co. v. Sargeant*, 40 Ill. App. 438. That is correct as to the first and principal part of this instruction, although that instruction does not include the metaphysical abstractions of the latter portion of the instruction in the case at bar. But in the *Sargeant* case it appears that the witness "toward whom that instruction pointed," as the court there states, had been reproached by his employer for his alleged omission of duty as to the particular matter involved in the case. In the case at bar, as above stated, we are not aware of any testimony upon which to base this instruction.

The court also gave to the jury at the request of appellee the following as her second instruction, viz. :

Second. "The court instructs the jury that the testimony of one credible witness is entitled to more weight than the testimony of many others, if, as to those other witnesses, the jury have reason to believe, and do believe, from the evidence and all the facts before them, that such other witnesses have knowingly testified untruthfully, and are not corroborated by other credible witnesses, or by circumstances proved in the case."

This instruction is also faulty. We do not now recall any case wherein an instruction has been approved which directs a jury as to the weight to be given to the testimony of a witness. And even if it is ever proper to instruct a jury that the testimony of one credible witness is entitled to more weight than the testimony of many others, it is not sufficient to base such instruction upon the theory that such other witnesses "have knowingly testified untruthfully," without limiting such untruthfulness to facts or questions material to the issue.

For the reasons indicated, the judgment of the Superior Court is reversed and the cause remanded.

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### Chicago Stamping Co. v. Robert C. Danly and K. H. Cottle.

1. *CERTIORARI—Requisites of the Petition.*—To sustain a writ of certiorari to remove a cause from a justice of the peace, the petition must show that the judgment was not the result of negligence on the part of the petitioner; that in his opinion it is unjust and erroneous, showing wherein the injustice and error consists; and that it was not in his power to take an appeal in the ordinary way, setting forth the particular circumstances which prevented him from doing so.

2. *SAME—What is Not Sufficient.*—The fact that the parties before the justice made an agreement not to appeal, and that the petitioner would have taken an appeal, as was his intention, had it not been for the agreement, is not sufficient to show that it was not in his power to take an appeal in the ordinary way.

3. *SAME—Petitions for—How Construed.*—The right to a writ of

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Chicago Stamping Co. v. Danly.

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*certiorari* is controlled by the statute, and the petition is to be construed most strongly against the petitioner.

**Certiorari.**—Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1899. Affirmed. Opinion filed October 27, 1899.

WM. J. CANDLISH, attorney for appellant.

No appearance by appellees.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This is an appeal from an order by the Circuit Court quashing a writ of *certiorari* and dismissing the petition upon which such writ was issued. To authorize or sustain such a writ to remove a cause from a justice of the peace, the petition therefor must set forth and show, first, that the judgment by the justice was not the result of negligence on the part of the petitioner; second, that the judgment in his opinion is unjust and erroneous, showing wherein the injustice and error consists; third, that it was not in the power of the petitioner to take an appeal in the ordinary way, setting forth the particular circumstances which prevented him from so doing.

Whether the amended petition of appellant was sufficient to meet the requirements of the statute as to the first and second items, it is not necessary here to inquire. It must not, however, be inferred from this that we are of opinion that the petition is sufficient as to those items. No brief or argument is filed by appellee, and the argument of appellant is mainly as to whether the amended petition is sufficient to meet the requirements of the statute as to the third item.

The petition states that after judgment had been entered against appellant in the justice of the peace court, the parties made an agreement, by the provisions of which they settled all the matters involved in this suit; that in consideration of said agreement, appellant "then and there agreed not to prosecute its said appeal," and that it "would have

appealed said cause, as was its intention, had it not been for the said agreement."

How can it be said that it was not in the power of appellant to take an appeal in the ordinary way, when the petition shows affirmatively that it was in its power, and that it intended so to do, but that it did not appeal because it had agreed that it would not? It would be a work of supererogation to investigate and cite authorities in support of so clear a proposition. The authorities cited by appellant do not support the contention of counsel. The right of a writ of *certiorari* is controlled by the statute, and the petition is to be construed most strongly against the petitioner. Whatever rights or remedies appellant may have, if any, for failure to perform the agreement set out in said petition, the right to a writ of *certiorari* is not one of them.

The judgment of the Circuit Court is affirmed.

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### Alexander Prussing v. Lewis B. Jackson.

1. **LIBEL—Statutory Definition.**—A libel is a malicious defamation expressed either by printing, as by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation; or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule or financial injury.

2. **SAME—Actionable Publications.**—A newspaper article which expressly charges a conspiracy of all the crushed stone dealers and cement manufacturers to bribe a sufficient number of the members of the city council, to secure the passage of an ordinance, which, if acted under, would be a fraud on the municipality and jeopardize the health of the entire city, and characterizes the passage of such ordinance as a crime to which the slaughter of the innocents will seem as mild as mother's milk, and then charges the city engineer with being one of the conspirators by saying that the ordinance will be recommended by him, and that he will be taken care of liberally, is actionable *per se*, and a jury will be warranted in assessing not only actual but exemplary damages.

3. **SAME—Publications—Writer of Libelous Articles.**—Where a person furnishes a libelous article to a newspaper for the purpose of having it published, and it is so published, it is, in legal contemplation, a publication by the person furnishing the article.

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 Prussing v. Jackson.
 

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4. CONSTRUCTION OF STATUTES—*Act in Relation to Libel*.—The act of the general assembly in relation to libel, approved June 24, 1895, (Laws of 1895, 315,) applies only to the publishers of newspapers.

**Action in Case**, for libel. Trial in the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Verdict and judgment for plaintiff. Heard in this court at the March term, 1899. Affirmed on condition of a remittitur. Opinion filed November 2, 1899.

ERNEST SAUNDERS and WILLIAM G. EENST, attorneys for plaintiff in error.

A publication is libelous *per se* when language is used concerning a person or his affairs, which from its nature necessarily must or presumably will, as its natural and proximate consequence, occasion him pecuniary loss. Newell, L. & S., 181.

The right to comment upon the public acts of public men is the right of every citizen, and is not the peculiar privilege of the press. *Kane v. Mulvaney*, W. R., 2 C. L. 402; *Odgers*, Libel, \*35.

The rule is that every defamatory publication implies malice, but privileged communications are an exception, and the rule of evidence as to such communications is so far changed as to require of a party to bring home to the alleged defamer the existence of malice as the true motive of his conduct. Newell, L. & S., 391.

A communication by a person immediately concerned in interest in the subject-matter to which it relates, for the purpose of protecting his own interest, in the full belief that the communication is true and without any malicious motive, is held to be excused from responsibility for a libel. Newell, L. & S. 510; *Brown v. Hathway*, 95 Mass. 239.

COLLINS & FLETCHER, attorneys for defendant in error.

A libel is to be construed as the world generally would understand it. *More v. Bennett*, 48 N. Y. 272; *Barnes v. Hamon*, 71 Ill. 609; *Folkard's Starkie on Slander and Libel*, Sec. 155; *Morgan v. Halberstadt*, 60 Fed. 595; Newell on *Slander and Libel* (2d Ed.), 302.

A libel should be considered as a whole, and not in de-

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tached parts. *State v. Bush*, 122 Ind. 42, 23 N. E. Rep. 677; *Morgan v. Halberstadt*, 60 Fed. Rep. 595.

A libel is a malicious defamation, expressed either by printing or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation of one who is alive, and thereby to expose him to public hatred, contempt, ridicule or injury. *S. & C. Ann. Ill. Stat., Ch. 38, par. 321*; *Hodkins v. Tanner*, 27 Chic. Leg. News, 180; *Jacksonville Journal Co. v. Beymer*, 42 Ill. App. 443.

Definitions and nature of a libel, and illustrations thereof. *Pfitzinger v. Dubs*, 64 Fed. 696; *Cerveney v. News Co.*, 139 Ill. 345; *Dexter v. Spear*, 4 Mason (U. S.) 115; *White v. Nichols*, 3 How. (U. S.) 266; *Cooper v. Greeley*, 1 Denio (N. Y.) 363; *Bradley v. Cramer*, 59 Wis. 311; *Colby v. Reynolds*, 6 Vt. 494; *Mitchell v. Bradstreet Co. (Mo.)*, 22 S. W. Rep. 558.

Plaintiff in error, in stating that words spoken, to be actionable, must impute a crime, is guilty of an inaccuracy. Such is not the law. *Townshend on Slander and Libel* (4th Ed.), Sec. 153, 158; *Newell on Libel and Slander* (2d Ed.), 84, 198, 199, 200.

The claim that written words of an official, to be libelous *per se*, must warrant removal from office, is unfounded. *Townshend on Slander and Libel*, (4th Ed.), Secs. 196, 197; *Folkard's Starkie on Slander and Libel*, Sec. 187; *Odgers on Libel and Slander* (Bigelow's Ed. 1881), 27; *Newell on Slander and Libel* (2d Ed.), 176.

MR. JUSTICE ADAMS delivered the opinion of the court.

This suit is brought to reverse a judgment rendered in favor of defendant in error against plaintiff in error for the sum of \$20,000. The action was case, for libel. The alleged libel is as follows:

"DEAR SIR: About two months ago the Chicago Brick Manufacturers' Association was informed by several of its members that a combination of all the crushed stone dealers, and all of the cement manufacturers of the city, had been formed for the purpose of obtaining the passage of an



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ordinance providing for the sole use of concrete, made from crushed stone and cement, in the building of Chicago sewers. The matter has been carried on in the utmost secrecy, but the brick manufacturers, whose business would be greatly affected by the passage of such an ordinance, have quietly secured sufficient information to convince them that another gigantic steal is contemplated, that money is said to be in escrow to an amount of nearly \$100,000 to secure the votes necessary in the council, and that the ordinance will be recommended for passage by Engineer Jackson, who, it is said, will be taken care of liberally.

"Aside from the fact that this will be another sale by the aldermen, to which we are accustoming ourselves, the absolute worthless character of such an improvement as a concrete sewer should, of itself, be a bar to the consideration of such an ordinance by honest members of the council. It is well known, from experience with concrete sewers, that the gases arising from the chemical constituents of sewage tend quickly to disintegrate the material, and therefore, sooner or later, to bring about a collapse. There is no question in my mind that men of such large experience as Mr. Claussen, of the Department of Sewers, look with dismay upon the future, because of the enormous contracts to be let this year for both sewer and tunnel work, which, if carried out under the provisions of the ordinance now being drawn, will, within a very few years, jeopardize the health of the entire city. Of course, this cuts no figure with our aldermen so long as there is 'something in it' for them, and unless a firm stand is taken by the reputable men in the council this ordinance will be railroaded through next Monday, that being the intention of the promoters.

"The brick manufacturers, although alive to the situation, are also well aware that the methods employed by the promoters of this enterprise are the only ones which carry weight with the men who are a majority in the council, and they have declined to become parties to any deal to prevent the passage of this ordinance. D. V. Purington, president of Brick Manufacturers' Association, and *ex-officio* chairman of the committee having this matter in charge, can probably give you more information. Personally, I believe that all the boodle ordinances heretofore passed may be considered creditable and philanthropic legislation in comparison with the passage of such an ordinance, which will be a crime to which the slaughter of the innocents will seem as mild as mother's milk. Once let the decay of

concrete sewer walls begin and the consequences of defective drains will soon be felt, especially should this take place in winter, when epidemics, caused by imperfect sanitation, are prevalent. Murder by violence would be a cardinal virtue."

The foregoing matter was published in the Times-Herald, a newspaper printed and published in the city of Chicago, July 12, 1896, and 100,000 copies of the paper containing the article were issued by the publishers at that date. Lewis B. Jackson, defendant in error, was appointed city engineer of the city of Chicago July 6, 1895, and entered upon his duties as such engineer July 16, 1895, and was such engineer during the month of July, 1896. He entered upon his professional career as a civil engineer in 1869, and between that year and 1895, when he was appointed city engineer of Chicago, had been employed in responsible positions by a number of railroad companies. It appears from the evidence that the duties of a civil engineer are investigating projects, making approximate estimates of the cost of work, preparing specifications and plans for the work, supervising it while in progress to see that it is done in accordance with the plans and specifications, and certifying vouchers for work done. Defendant in error testified that since he had been a civil engineer he had certified vouchers to an amount between ten and eleven millions of dollars. An ordinance of the city of Chicago, introduced in evidence, provides, among other things, as follows:

"The City Engineer shall perform such duties as may be required of him by the Commissioner of Public Works or the ordinances of the city.

"He shall perform all such services in the prosecution of public improvements as may require the skill and experience of a civil engineer."

Plaintiff in error, called as a witness for defendant in error, on being shown the article as printed and published in the Times-Herald, testified that he first saw it as printed and published March 12, 1896. On being asked the question, "Do you know who composed it?" he answered, "Yes, sir; I did." On cross-examination by his attorney

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he was asked, "Mr. Prussing, you say you wrote this article; what caused you to write this article?" to which question he answered, "Well, I can't say that I wrote *this* article, but one similar to it was written in long-hand by myself." Plaintiff in error, in his examination in chief, testified that he knew Edmund Varian, a reporter; that he met him March 11, 1896, at witness' office, but did not know how he happened to come there; that he did not send for him or for any one from the Times-Herald office; that he presumed he came through the Times-Herald people. In his cross-examination by his attorney he gave this account of the matter:

"Varian came into my office; stated that he was sent by Times-Herald to know if I had any information regarding deal in cement or crushed stone which was understood was to be brought before council following Monday night; told him I had no information except what had been given me second-hand, to which he was welcome, as I was about to write a letter to your aldermanic friends and tell them what I knew about it; told him at the time I was surprised that newspaper boys didn't know anything about it, because it was common rumor among building men that a scheme of that kind was on foot; he stated that the papers were not aware of it, and asked if he could see copy of the letter I was going to send aldermen, I had reference to. I said, 'Certainly you may,' and let him have it. When through reading it, he said, 'Is this all you know about it?' I said, 'I don't know anything at all about it except what has been stated here as rumor or hearsay.' He said, 'May I take this article with me?' I said, 'Most assuredly you may.' He took it. Next time I saw anything similar to what I had written was in next day's paper."

On being asked what, if anything, he said to Varian in relation to the publication of the article, he answered, "I said nothing."

Herman L. Reiwitch testified that he was city editor of the Times-Herald July 11 and 12, 1896. On being shown the article as printed and published, he was asked, "When did you first see anything like that, or similar to that?" and answered, "The afternoon preceding its publication."

He further testified that it was brought to him by Varian, the reporter, and was printed as brought in.

Counsel for plaintiff in error contend that the article is not libelous *per se*. Our statute thus defines libel :

"A libel is a malicious defamation, expressed either by printing, as by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity virtue or reputation, or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or financial injury." 1 S. & C.'s Stat. (2d Ed.), 1321, par. 321.

Counsel for plaintiff in error contend that the article is not libelous *per se*, because it merely charges an intent on the part of the defendant in error to do wrong in the future, and because it does not impute a crime. The language is, "The brick makers \* \* \* have quietly secured sufficient information to convince them, etc., \* \* \* and that the ordinance will be recommended for passage by Engineer Jackson, who, it is said, will be taken care of liberally." No name of any person who said that Jackson would recommend the passage of the ordinance, or of any person who said he would be taken care of liberally, is given. The statement, therefore, must be assumed to have been made on the personal responsibility of the writer of the article.

Smith v. Stewart, 5 Pa. St. 372, was an action for oral slander. The words charged were, "That man was in the penitentiary of Ohio and I can prove it." Evidence was introduced by the defendant that he said "If reports be true," etc. It was contended that if the words charged in the indictment were preceded by the words "If reports be true" there was a fatal variance, but the court overruled the contention, saying :

"In the language of Lord Kenyon (Davis v. Lewis, 7 Term R. 19), 'the plaintiff can only impute the slander to him who utters it, if the latter does not mention the name of the person from whom he heard it.' If it were otherwise, one individual might ruin the loftiest reputation and torture the purest heart in the country, by secretly circulating, giving the embodiment of the report (such as it is)

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to some vile slander, and then setting up the very slander itself as a defense to an action for uttering and publishing it. *If reports be true*. This language designates no individual, lights upon no one, describes nobody, and is, in fact, nothing but the mere ideal of responsibility which the wicked conjure up to shelter them, whilst they inflict a wound."

The court further say :

"The words assumed in defendant's point are substantially and legally of the same effect as those laid in the *narr*."

Booker v. The State, 14 So. Rep. 561 (Ala.), was indictment for oral slander. The words charged were :

"That Bryant Mancill had hired witnesses in the justice of the peace court to swear to lies."

The testimony was that Booker, speaking of the trial, said:

"He was satisfied that he (Mancill) had hired witnesses to swear lies against him."

Held, there was no variance. The court, after citing a number of cases, say :

"The principle of these cases is, that the utterance of slanderous words on belief, or on information or report, unless the name of the informant be furnished as part of the utterance, is the legal equivalent of their positive statement as facts."

In Treat v. Browning, 4 Conn. 408, the court say:

"If a person utter of another, 'She is a prostitute,' or, 'If I am not misinformed, she is a prostitute,' the essential charge in both instances is constructively the same, or this unhappy consequence must inevitably result. that, by a mode of phraseology which indicates that the person speaking had heard the crime imputed, slander might be propagated with impunity. If this were not the legal construction, malice would not desire, nor could it desire, a better shield of protection from suit for the publication of the most wanton calumny." See also Boyce v. Maloney et al., 58 Vt. 437.

In view of the authorities cited and the reason of the matter, the language of the article is equivalent to the

positive statement, "The ordinance will be recommended by Engineer Jackson, who will be liberally taken care of." In determining whether the article in question is libelous *per se*, or actionable without proof of special damage, it is to be borne in mind that words which, if merely spoken, are not actionable, may be actionable if printed and published. Odgers on Libel and Slander (by Bigelow), 1st Am. Ed., Secs. 3, 4; also, that the whole article must be considered, and the language used understood in accordance with its ordinarily accepted meaning. *Ib.*, Sec. 3; *Nelson v. Borchenius*, 52 Ill. 236; *Barnes v. Hamon*, 71 Ib. 609; *Ransom v. McCurley*, 140 Ib. 626.

The article first states that "A combination of all the crushed stone dealers and cement manufacturers of the city has been formed for the purpose of obtaining the passage of an ordinance providing for the sole use of concrete, made from crushed stone and cement, in the building of Chicago sewers." It then states that "another gigantic steal is contemplated;" that money to an amount of nearly \$100,000 is in escrow to secure the necessary votes in the council, and that the ordinance will be recommended by Engineer Jackson, who will be liberally taken care of. It further states:

"Aside from the fact that this will be another sale by the aldermen, to which we are accustoming ourselves, the absolutely worthless character of such an improvement as a concrete sewer should, of itself, be a bar to the consideration of such an ordinance by honest members of the council," etc.

The article expressly charges a conspiracy of all the crushed stone dealers and cement manufacturers to bribe a sufficient number of the members of the city council, the aldermen, to secure the passage of an ordinance which, if acted under, would be a fraud on the municipality and jeopardize the health of the entire city. The passage of such an ordinance is characterized as "a crime to which the slaughter of the innocents will seem as mild as mother's milk." The article then charges Engineer Jackson with being one of the conspirators, by saying that the ordinance will be recommended by him, and that he will be taken care

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of liberally, which can only mean that he consented, for a pecuniary or other consideration, to act with the other conspirators to effect the object of the conspiracy, namely, the passage of the ordinance.

“A conspiracy may be regarded as a combination of two persons or more, by a concerted action, to accomplish a criminal or unlawful purpose, or a purpose not in itself criminal, by unlawful or criminal means.” *Heaps v. Dunham et al.*, 95 Ill. 583; *Spies v. The People*, 122 Ib. 212.

To bribe a member of the city council, with intent to influence his vote, is a crime (1 S. & C.’s Stat., Ch. 24, par. 80), and to conspire to procure the passage of an ordinance by such bribery is a conspiracy to effect that purpose by criminal means.

To charge one with having consented, for a pecuniary or other consideration, to become the base instrument of such a conspiracy, clearly tends to impeach his honesty, integrity and reputation, and is, therefore, within the very words of the statute defining libel, and is actionable *per se*. The law implies malice from the publication of an article libelous on its face, and in such case no evidence of malice other than the libel itself is necessary to a recovery. *Odgers on L. and S.*, Sec. 6; *Townsend on S. and L.*, Sec. 399; 3 *Greenl. on Ev.* (13th Ed.), Sec. 168; *Matteon v. Albert*, 97 Tenn. 232; *Hintz v. Graupner*, 138 Ill. 158, 166; and the words being actionable *per se*, a jury will be warranted in assessing not only actual but exemplary damages. *Hintz v. Graupner, supra*. The original article delivered by plaintiff in error to the reporter, Varian, July 11, 1896, was not produced on the trial, but a copy of the issue of the *Times-Herald* of July 12, 1896, containing the article heretofore quoted, was admitted in evidence. Counsel for plaintiff in error insist that the original should have been produced, and that the *Times-Herald* containing the article was improperly admitted in evidence. Defendant in error testified that in the afternoon of July 12, 1896, his attention was called to the article published in the *Times-Herald* that day by Mr. Kent, the commissioner of public works of the city of Chicago; that Kent read the article, and that during the cc

versation between him and Kent, Prussing came in; that witness asked Prussing what he knew of the article, and he said it was information which had been given him; that, on being asked to name his informant, he declined to do so then, but said he would give the name to defendant in error later; that the article in the Times-Herald was being discussed, when Kent asked Prussing if he knew this.

"He said he didn't know it himself. He says, 'Who is your informant, or where did you get your information?' He says, 'This report, this letter, is exactly what I was informed.'"

The Court: "What letter?" Ans. "The letter that appeared in the article of March 12th, in the Times-Herald. Besides the reportorial remarks, or statements in the paper, there was a letter in small type."

Judge Collins: Q. "Was anything said about how this communication came in the Times-Herald?" A. "Yes, sir."

Q. "What was said?" A. "Mr. Prussing stated that the letter there that appeared was the one that he had given to the reporter. He was asked if he knew me, by Mr. Kent; he said he did not. He was asked if he had ever met me; he said he had not."

The witness was then shown the Times-Herald of March 12, 1896, and his attention was called to the published article, commencing "Dear Sir," when he was asked if that was the statement about which he was talking, to which question he answered, "It is."

On objection made by counsel for Prussing, this occurred:

The Court: "Is this article or statement that was just identified here, in answer to Judge Collins' question, the one that you and Prussing were talking about?" A. "Yes, sir." Q. "Had you read it before that conversation?" A. "Yes, sir, I had, in the office." Q. "Was the article there at the time of the conversation?" A. "The paper was there." Q. "Now state what, if anything, was said about the publication of it, or his connection with it?" A. "He stated, he was asked by Mr. Kent if he knew anything about that report, and then the question was asked afterward whether that was what he gave to the reporter. He said it was. Then, as I remember, Mr. Kent asked him if he knew me. He said he did not know me, nor had ever met me; that the information in that was given him by another party."



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Prussing v. Jackson.

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Plaintiff in error having failed to produce the original writing, on notice to produce it, the court, on attorneys for defendant in error undertaking to connect the printed and published article in the Times-Herald with plaintiff in error, admitted such printed article in evidence. Prussing's attorney objected generally and made this specific objection: "I object until it is properly connected." It is now claimed that proper connection was not made. Reiwitch, the city editor of the Times-Herald, was subsequently called, and having testified, as heretofore stated, that the original letter or article was brought to him by Varian, the reporter, and that it was printed as brought in, testified that he told Varian to keep the letter, his reason for so telling him being that it was of a peculiar character and might be questioned; that Varian had not been connected with the Times-Herald for about one and one-half years; that he did not know where he was; that if the manuscript had been preserved by the Times-Herald, it would most likely be in his (the witness') possession; that it was not in his possession; that there was no particular place in the office of the newspaper where such manuscripts were kept; that the custom was to destroy such manuscripts within a few days after they were used; that, so far as he knew, the manuscript was destroyed, and that it would be absolutely impossible to find it. Plaintiff in error, called as a witness by defendant in error, testified, as heretofore stated, that he gave the manuscript to Varian, and we think it a reasonable and natural inference from his testimony that he gave it to Varian for publication in the Times-Herald. He knew that Varian was a reporter for that paper, and also that he had been sent to him by the paper for information. He says in his testimony:

"Mr. Varian came into my office and stated that he had been sent by the Times-Herald to know if I had any information regarding a deal about cement or crushed stone, which it was understood was to be brought before the council; an ordinance was to be brought before the council on the following Monday night."

He also knew that the Times-Herald was a newspaper, and must have known that the information sought was

for publication. Knowing all this, he not only gave the article to the reporter, but gave it to him eagerly, as his testimony indicates, without any request that it should not be published. For what purpose, if not for publication, did he give the manuscript to Varian? Was it merely for Varian's private information, or for the private information of his employers? Varian was seeking information, not for himself, or for any private person, but for the Times-Herald, a public newspaper, which could only use information gathered by its reporters by printing and publishing it. We think the inference irresistible that the manuscript was given by plaintiff in error to Varian for the purpose of having it published in the Times-Herald. This being so, the publication in the Times-Herald was, in legal contemplation, a publication by plaintiff in error. *Clay v. The People*, 86 Ill. 147; *Newell on Defamation, etc.*, 228, Sec. 2; 243, Sec. 20; *Odgers on Libel and Slander* (1st Am. Ed.), par. 155; *Thomas v. Smith*, 75 Hun, 573; *Bond v. Douglas*, 7 C. & P., star p. 626; *Burdett v. Abbott*, 5 Dow's Rep. (H. L.), 165, 200, 201.

In *Burdett v. Abbott*, *supra*, Lord Erskine said:

"And if I send a manuscript to the printer of a periodical publication, and do not restrain the printing and publishing of it, I am the publisher."

That the article, as published in the Times-Herald, was the same as the manuscript article given by plaintiff in error to Varian, appears from the admissions of plaintiff in error, as testified to by Jackson, which admissions are uncontradicted, and also from the testimony of Reiwitch. The claim, therefore, that plaintiff in error was not connected by the evidence with the publication in the Times-Herald, can not prevail. It is contended here that no sufficient foundation was laid for the admission of the printed article; this objection was not made on the trial, but only a general objection, and the specific objection that the defendant had not been connected with the printed article. The evidence was not objected to on the ground that it was secondary evidence, and that objection can not successfully

be made here for the first time. *Walsh et al. v. Wright*, 101 Ill. 178; *Condon v. Brockway et al.*, 157 Ib. 90.

But even though an objection sufficiently specific had been made, it is our opinion that, in view of the evidence, it would not avail plaintiff in error. It is objected that it was error to permit the examination of plaintiff in error as a witness. The reason assigned by counsel for this objection is that plaintiff in error could not be called on to answer any question the answer to which might tend to prove him the publisher of the alleged defamatory matter. The general rule in such case is that the party must, himself, claim his privilege under oath, and that the privilege being his, his attorney can not claim it for him. 1 Greenl. on Ev. 451; *Odgers on Libel and Slander*, Sec. 505; *Shenck v. Shenck*, 20 N. J. L. 208, 212; *Commonwealth v. Price*, 76 Mass. (10 Gray) 472, 476; *Same v. Gould*, 158 Mass. 499, 508.

Plaintiff in error did not claim his alleged privilege, nor did his counsel claim it for him, the objection being general and such as might be made in the examination of any witness. But it appears from the record that plaintiff in error was not entitled to claim the privilege contended for. He gave the manuscript to Varian July 11, 1896, and it was published in the *Times-Herald* the next day; the jury was impaneled January 13, 1898; the punishment for libel is a fine not exceeding \$500, or confinement in the county jail not exceeding one year; libel, therefore, is merely a misdemeanor (*Baits v. The People*, 123 Ill. 428), and prosecution for a misdemeanor must be commenced within one year and six months from the time of committing the offense. 1 S. & C.'s Stat., Ch. 38, par. 497. The jury was impaneled January 13, 1898, and the prosecution was then barred, therefore plaintiff in error was bound to answer. Greenl. on Ev., Sec. 451, citing the *People v. Mather*, 4 Wend. 229, 252, 255, in which case the question is fully discussed and the text supported.

Questions material to the issue, and which merely tend to degrade the character of the witness, are not within the privilege. 1 Greenl. on Ev., Sec. 454.

On defendant in error offering in evidence the ordinance heretofore mentioned, prescribing the duties of city engineer, and showing that he is an officer in the executive department of the municipal government known as the department of public works, attorney for plaintiff in error objected to the evidence "as incompetent and immaterial under the pleadings in this case." The objection now made is that the ordinance was not pleaded. It is averred in the declaration that defendant in error was city engineer of the city of Chicago, and that the language complained of was composed and published of and concerning him as city engineer. The city engineer is not a charter officer, but such office may be created by the city council by ordinance. 1 S. & C.'s Stat., Ch. 24, par. 73, 74. The ordinance therefore was, as we think, competent under the pleadings to prove that there was such an office as city engineer, and if it was competent and material for any purpose, it was admissible in evidence. We do not think the objection made to the admission of the ordinance in evidence sufficiently specific to direct the attention of the court to the fact that the ordinance was not pleaded. The objection is that it was incompetent and immaterial "under the pleadings." Any evidence which is incompetent and immaterial is so under the pleadings. We can not perceive that the words "under the pleadings" render the objection specific; and that such an objection as is here made must, to avail plaintiff in error, have been specific in the trial court, is well settled.

Counsel contend that the article was privileged. That it was not absolutely privileged is too clear to admit of discussion. Odgers on L. and S., Sec. 183.

Can qualified or conditional privilege be claimed? The evidence is that at the time of the publication plaintiff in error was a brickmaker. As such he may have been interested in the construction of sewers; but he did not make the communication or publish the article to any one having an interest in the subject-matter corresponding with his interest, nor to any one who could redress the wrong, if any, nor was there any duty incumbent on him to make the

communication to Varian or to the Times-Herald. The communication, therefore, was not qualifiedly or conditionally privileged. Odgers on L. and S., Sec. 196, *et sequentes*.

But even though the occasion were privileged, this would not divest the article in question of its libelous character. Addison, an author quoted by counsel for plaintiff in error, says:

"A man has no right, as we have seen, to make himself the medium of propagating scandalous and defamatory accusations, unless he, himself, believes them to be true; and his belief is not an honest belief, if it is formed in a reckless and inconsiderate manner. If he has the means, by inquiry, of ascertaining whether the charge is true or false, and neglects to make inquiry, and exercises no effort to arrive at the truth, his belief can hardly be said to be an honest belief; for whoever publishes and circulates in writing, opinions and statements unfavorable to another, ought to be prepared to show that he had some reasonable grounds for it," etc. See also Odgers on L. and S. 199, and Newell on Defamation, etc., 504, *et sequentes*.

That the publication in question was recklessly and inconsiderately made, is abundantly proved by the testimony of plaintiff in error. He testified that he did not know Jackson, that he had no personal knowledge of, and that he made no investigation to ascertain the truth or falsity of the charge, although he had ample opportunity so to do. He testified that D. V. Purington was his informant; but Purington testified that he said nothing to plaintiff in error about Jackson and had never heard the latter's name mentioned in connection with the matter until the publication of the article. It would seem that the only privilege which plaintiff in error can legally claim in the premises is that guaranteed to all citizens by the bill of rights, namely: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty." Plaintiff in error has enjoyed the guaranteed privilege; if he has abused it, he can not avoid his consequent responsibility.

The first, second and third instructions for defendant in error are objected to because the word "libel" is used in them

with reference to the publication. The charge in the article is plain and unambiguous; it was, therefore, within the province of the court to determine whether it was libelous, and if libelous, to so instruct the jury. *Hunt v. Bennett*, 19 N. Y. 173; *Pittock et al. v. O'Neill*, 63 Pa. St. 253; *Pugh v. McCarty*, 44 Ga. 383; *Gregory v. Atkins*, 42 Vt. 237; *Gottbehuett v. Hubachek*, 36 Wis. 515.

No good reason is perceived for making alleged libelous publications an exception to the general rule that the interpretation of written instruments is for the court.

Instructions, substantially the same as the second and third instructions for defendant in error, were given in *Sheahan v. Collins*, 20 Ill. 325, and were excepted to, but the court affirmed a judgment for the plaintiff. The fourth instruction for defendant in error is also objected to. In *Baxter et ux. v. Young*, 44 Ill. 42, which was an action for slander, the court approved an instruction substantially the same as the fourth instruction, except that instead of the word "libel" the word "slander" was used in the instruction. *Ib.* 44.

We find no error in any of the instructions given for defendant in error.

Counsel for plaintiff in error, apparently relying on "An act in relation to libel," approved June 24, 1895, urges that there is no evidence of a demand in writing by defendant in error on plaintiff in error for a retraction, and therefore certain instructions asked by defendant below to the effect that punitive or exemplary damages could not be recovered should have been given. The act is as follows:

"Sec. 1. That in any action brought for the publication of a libel in any newspaper in this State, the plaintiff shall recover only actual damages if it shall appear at the trial of such act that such publication was made in good faith and that there were reasonable grounds for believing that the statements set forth in such publication were true, and that its falsity was due to mistake or misapprehension of facts, and that in the next two regular issues of said newspaper, after said mistake or misapprehension was brought to the knowledge of the publisher or publishers of such newspaper, whether before or after suit brought, a correc-

tion or retraction was published in as conspicuous a manner and place in said newspaper as was the libel.

Sec. 2. No exemplary or punitive damages shall be recovered in any action brought for the publication of a libel in any newspaper in this State, unless the plaintiff shall, before bringing suit, give notice in writing to the defendant to publish a retraction or correction of the libel, and shall, before bringing suit, allow the defendant a reasonable time in which to publish such retraction or correction. Proof of publication of such retraction or correction shall be admissible in evidence under the general issue in mitigation of damages, and in evidence of the good faith of the defendant, provided that the retraction or correction shall be published in as conspicuous a manner and place in said newspaper as was the libel. *Provided*, that the provisions of this act shall not apply to the case of any libel against any candidate for public office in this State, unless the retraction of the charge is made editorially in a conspicuous manner at least ten (10) days before the election." 3 S. & C.'s Stat. 3779.

The Supreme Court of Michigan held, in *Park v. Detroit Free Press Co.*, 72 Mich. 560, that a statute substantially the same, passed in 1835 (3 Howell's Annotated Stat. Mich. 3743), applied only to the publishers of newspapers. We are of the same opinion in regard to the statute quoted *supra*.

Counsel for plaintiff in error object that one Ernst Lambrecht was accepted as a juror to try the cause, and that H. G. Lambert signed the verdict. This objection is based on what appears in the transcript to be a copy of a paper purporting to be a verdict under which twelve names are written, one of which is H. G. Lambert. This seeming copy is not in the bill of exceptions, is not a part of the record, and we can not consider it. *Lambert v. Borden*, 10 Ill. App. 648.

The record proper shows that Ernst Lambrecht and eleven others were impaneled as a jury to try the cause, and that subsequently the jury theretofore impaneled came into court and announced their verdict. The announcement of the jury in open court, which was received and recorded, is the true verdict. *Griffin v. Larned*, 111 Ill. 432.

Numerous objections to rulings of the trial court, not mentioned in this opinion, were made by counsel for plaintiff in error, in none of which do we find reversible error.

Plaintiff in error objects that the damages are excessive. Counsel for defendant in error suggests that if the court should so think, it is within the power of the court to order a remittitur. Defendant in error introduced evidence showing that plaintiff in error was the owner of certain shares of stock subject to a mortgage of \$6,900, and that he owned no other property. Estimating the shares at par and deducting the mortgage incumbrance leaves \$11,700. No market value was proved. In view of this evidence, and other circumstances disclosed by the record, we think a remittitur should be ordered of \$8,000. On defendant in error filing such remittitur within ten days, the judgment will be affirmed for \$12,000.

Affirmed on condition.

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### John Gravadahl v. Chicago Refining Co. et al.

1. VERDICTS—*When the Court May Direct.*—If the evidence is insufficient to support a verdict for the plaintiff, and such a verdict, if returned, must be set aside as unsupported, the action of the trial court in directing a verdict for the defendant, is proper.

2. SAME—*When the Evidence Should be Submitted to the Jury.*—If the evidence is such that reasonable men of fair intelligence might from it draw different conclusions as to whether the facts necessary to create liability of appellee have been established, then the evidence should be submitted to the jury.

3. APPELLATE COURT PRACTICE—*As to Weighing Conflicting Evidence.*—The court declines to weigh conflicting evidence, consisting of statements made by witnesses before the trial and the testimony given by them at the trial, and upon a question of credibility determine that a verdict could not have been properly given for the plaintiff.

4. EVIDENCE—*Of Other and Safer Appliances Properly Excluded.*—Where the matter in issue is whether a particular scaffold is reasonably safe, not whether some other scaffold would be safer, testimony offered as to a better and safer method of constructing the scaffold, is properly excluded.



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Gravadahl v. Chicago Refining Co.

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**Action in Case,** for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed November 2, 1899.

**Statement.**—This an action to recover for personal injury, caused, as it is alleged, by negligence of appellee.

Appellant was in the employ of appellee engaged in carpenter and millwright work, and while at work upon a scaffold provided by the appellee, he was injured. The scaffold was constructed upon the first floor of appellee's building and for the purpose of enabling workmen to reach, and fasten timbers to the ceiling above, which was the floor of the second story of the building. It does not appear from the evidence that the building was in process of construction; the timbers were to be bolted or fastened to the ceiling above the first story for the purpose of adjusting certain machinery. Upon the first floor, which was the ground floor of the building, and along the side of the scaffold, were three railroad tracks, used in appellee's business for the purpose of moving cars of freight. There was evidence tending to show that the distance from the corner posts which formed one side of the scaffold, to a car upon the nearest railroad track, would be "a foot or two feet," and there was evidence tending to show that the east and west stringer, which was the end of the floor support of the scaffold on the end nearest the track, was about four feet distant from cars standing upon the nearest track. The tracks ran east and west. The scaffold was square and the planks which formed its flooring rested upon stringers nailed between the posts which formed the corners. These planks were loose and movable, and they were laid north and south, the ends extending toward the railroad tracks. There was evidence tending to show that appellant had never worked upon the scaffold until the afternoon when the injury occurred, and that he left other work and went to work upon the scaffold by direction of appellee's foreman. Appellant testified that the scaffold had not been changed; that the planks which formed its floor had not been moved from the time when

he went upon it until the time of the injury. He testified that he went to work upon the scaffold at 12:30 P. M. Between 2:30 and 3 P. M. of the same afternoon a car was moved along the railroad track nearest to the scaffold, and the evidence tends to show that in moving, it struck some plank or planks of the scaffold, which plank being loose, had become moved out, lengthways, toward the track. The result was that the scaffold was demolished and appellant was injured. Appellant and two others testified to facts connected with the happening of the injury.

The two witnesses other than appellant had each made a statement previous to the trial, which purported to give an account of the occurrence. In each of these accounts of the occurrence were statements which tended to show that the loose planks were moved about during the time that appellant was at work upon the scaffold, by appellant and others working with him. At the trial these witnesses did not testify that appellant had anything to do with moving the planks, or that they were moved after appellant came upon the scaffold; but one of them testified that in the course of the work the planks had to be moved about, as the workmen had occasion to change their positions.

At the close of the evidence offered by the plaintiff, appellant, the trial court gave a peremptory instruction, directing a verdict of not guilty. From judgment upon that verdict this appeal is prosecuted.

BEACH & BEACH, attorneys for appellant.

EDWIN WALKER, attorney for appellee.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

There is presented upon this appeal but one question of controlling importance, viz.: whether the evidence, with all legitimate and natural inferences to be drawn therefrom, so far tends to support appellant's alleged cause of action as to warrant the submission of such evidence to a jury.

If, without weighing conflicting evidence or passing upon the credibility of witnesses, it could be said that the evidence is so far insufficient to support a verdict for the appellant that such a verdict, if returned, would have to be set aside as unsupported by evidence, then the action of the trial court in directing a verdict for appellee was right. *Rack v. Chicago City Ry. Co.*, 173 Ill. 289.

But if the evidence is such that reasonable men of fair intelligence might from it draw different conclusions as to whether the fact here necessary to create liability of appellee has been established, then the evidence should have been submitted to the jury. *Wabash Ry. v. Brown*, 152 Ill. 484; *C. & N. W. Ry. Co. v. Hansen*, 166 Ill. 623; *Sidall v. Jansen*, 168 Ill. 43; *Offut v. The W. C. E.*, 175 Ill. 472.

There is no such evidence of any contributory negligence on the part of appellant as would warrant the trial court in directing a verdict for appellee. The only question was as to the sufficiency of showing that there was negligence of appellee which was a proximate cause of the injury, and we are of opinion, after a careful review of the evidence, that this question should have been submitted to the jury. If the contention of counsel for appellee as to the facts presented could be maintained, viz., that it does not appear from the evidence that appellee moved the car in question, and that it is established by the evidence that the condition of danger which caused the injury was the result of the acts of appellant and fellow-servants of appellant in moving the flooring of the scaffold about, then a very different question would be presented. In that event the only question of negligence on the part of appellee would be as to whether it could be found to be negligence to erect a scaffold of the kind in such proximity to the railroad tracks. But we are not prepared to hold that no different conclusions of fact than those contended for by counsel for appellee could be reasonably drawn from the evidence. Appellant testified that from the time when he went upon the scaffold the planks were not moved. If from this evidence and the evidence as to the car striking the scaffold the jury might

reasonably have found that the scaffold was in a dangerous condition when appellant was directed to go upon it to work, then it was error to exclude from the jury the consideration of such evidence. *Hess v. Rosenthal*, 160 Ill. 621; *C. & A. R. R. Co. v. Maroney*, 170 Ill. 520; *Offut v. The W. C. E.*, *supra*.

And if the evidence would support such a finding of fact, then the fellow-servant doctrine, invoked by counsel for appellee, would have no application. *C., B. & Q. R. R. Co. v. Avery*, 109 Ill. 314; *Hess v. Rosenthal*, *supra*.

Nor do we regard as tenable the contention that the evidence wholly fails to show that appellant was directed to go upon the scaffold by a vice-principal of appellee. Harwig testified as follows:

"Q. When Cluth was absent from the work, who had charge or direction of the men? A. I did.

"Q. Do you know whether or not you directed Gravadahl that afternoon as to what he should do? A. Yes, sir; I told him to go on that scaffold and drill some holes there for some heavy bolts to hang the shaft."

This witness also testified that he worked in common with the other workmen, including appellant, and that he took all orders from Cluth, the foreman, and merely conveyed them to the others. But we can perceive no material difference in the effect of Harwig's command to appellant, whether he got his direction in the matter from Cluth, or gave it while acting as a foreman in the absence of Cluth.

In one of the counts of the declaration it is alleged, in substance, though inartificially, that appellees directed the movement of the car which ran into a part of the scaffold and caused its fall. There was some evidence tending to show that appellee did move the car. Whether it was negligent to move a car upon a track so near to this scaffold, upon which appellant and others were at work, without first learning of the condition of the movable flooring of the scaffold, was a question of fact for the jury. We can not weigh the somewhat conflicting evidence, consisting of statements made by the witnesses before the trial and the testimony given by them at the trial, and upon a question

of credibility, determine that a verdict could not have been properly given for the appellant. Neither could the trial court, upon a demurrer to the evidence, or motion in the nature of a demurrer, base its action upon such consideration. *Rack v. Chicago City Ry. Co.*, *supra*.

Whether by reason of such question of credibility and weight of evidence, the appellant may eventually be able to recover, is not to be determined now. We can only determine now that there was sufficient in the evidence to warrant its submission to a jury, not upon the theory that the evidence amounts to a scintilla only, in support of the appellant's right to recover, but upon the proposition that reasonable minds might reasonably differ in conclusions of fact as to such right.

We are of opinion that the ruling of the trial court, excluding proffered testimony as to a better and safer method of constructing the scaffold, was correct. The matter in issue was whether the scaffold in question was reasonably safe; not whether some other scaffold would be safer. *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *C., B. & Q. R. R. Co. v. Smith*, 18 Ill. App. 119; *Richards v. Rough*, 53 Mich. 212; *Sweeney v. Berlin & Jones Co.*, 101 N. Y. 520; *Kehler v. Schwenk*, 144 Pa. St. 348.

In the case last cited the Pennsylvania court said :

"Except to make another man's will for him, after his death, there is nothing which a jury is more apt to think it can do better than the owner, especially under the stress of a claim for damages by one who has been injured, than to say how another man's business ought to have been managed, and nothing in which juries should be held more strictly and unflinchingly within their proper province."

We think that the court was right in refusing to hear evidence upon a collateral issue, viz., as to whether there was or was not a better and a safer method of constructing scaffolds—an issue the determination of which would not determine the liability of appellee.

For the error in peremptorily directing a verdict, the judgment is reversed and the cause is remanded.

**Abner G. Murray and P. W. Harts v. George F. Emery,  
Ex'r, etc.**

1. **MORTGAGES**—*Assumption of Payment by a Grantee.*—Where the grantee assumes the payment of an existing incumbrance on land conveyed to him, he becomes, as between himself and his grantor, the principal debtor.

2. **LIMITATIONS**—*Where the Running of the Statute is Arrested by Promises.*—Where a grantee assumed the payment of a mortgage and paid interest on the notes secured by such mortgage for nearly twenty years, and agreed in writing that, in consideration of the forbearance by the holder of the notes to enforce collection, he would not avail himself of the statute of limitations in defense of a suit upon the mortgage or notes, *it was held*, that his agreement would arrest the running of the statute.

3. **CONVEYANCES**—*Effect of Assuming an Incumbrance.*—Where a person assumes an incumbrance on land conveyed to him and agrees to pay it as a part of the consideration, he becomes liable for such incumbrance to the holder of it.

**Bill for Relief.**—Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Hearing and decree for complainants; appeal by defendants. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed October 27, 1899.

EDWIN B. HARTS, attorney for appellants.

CHARLES E. POPE and CHARLES L. CAPEN, attorneys for appellees.

MR. JUSTICE SHEPARD delivered the opinion of the court.

By warranty deed dated January 9, 1874, one Elvira W. Spaulding acquired the title to certain land in Cook county, and gave back a trust deed, in the nature of a mortgage of the premises, to one Sweet, dated March 13, 1874, to secure a part of the purchase price, evidenced by three promissory notes made by one Poucher, for \$2,666.66 each, payable in one, two and three years.

Subsequently, the said Spaulding conveyed all of said premises, by two warranty deeds, to one Butler. The first

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of said deeds bears date September 13, 1874, and conveys a part of said premises, subject to said trust deed upon the whole, but provides that of said "incumbrance the party of the second part (Butler) assumes \$4,332, with interest from and after the date hereof, according to the tenor of the said notes in the said trust deed mentioned, and does not assume any further or greater sum."

The other of said deeds bears date January 21, 1875, and conveys the rest of said premises, subject, also, to said trust deed upon the whole, but provides that of said "incumbrance the party of the second part (Butler) assumes the sum of \$1,125, which said sum includes the interest on said notes to January 1, 1875, but does not assume any further or greater sum."

Then, on March 1, 1875, by warranty deed of that date, the said Butler conveys all of said premises to the appellant P. W. Harts. The deed from Butler to Harts describes the premises by two separate descriptions, the same as the deeds from Spaulding to Butler, and seems to follow exactly the language of those deeds in respect of the subjecting and assumption clauses referring to said trust deed.

By his warranty deed dated April 15, 1897, appellant Harts conveyed all of said premises to the appellant Murray, without any reference being made in said deed to the said trust deed or the indebtedness thereby secured.

In the meantime, appellant Harts executed and delivered to Hanson M. Hart, the then holder of said notes, to whom they had been regularly indorsed, a certain agreement in writing, as follows:

"Whereas, Hanson M. Hart, of Portland, in the State of Maine, holds three notes of hand of \$2,666.66 each, dated March 13, 1874, one payable in one year from date, one in two years from date, and one three years from date, with interest at eight per cent per annum, signed by Richard M. Poucher, payable to the order of Edward F. Sweet, trustee, all of which came to the hands of said Hart duly indorsed, which said notes are secured by a mortgage or trust deed from Elvira W. Spaulding of certain real estate, and

Whereas, I, P. W. Harts, am the owner of said land sub-

ject to said trust deed, and am to pay the said notes and arrears of interest and such as shall accrue, and

Whereas, said Hart, at my request, has forbore to enforce payment of said notes by suit, foreclosure of said trust deed or otherwise, and I find it inconvenient to pay said notes for the present;

Now, therefore, in consideration of the forbearance and indulgence of the said Hart, in the premises, I hereby promise and agree that in the event he shall hereafter resort to legal remedies for collecting said notes by suit, foreclosure of said trust deed or otherwise, I will not avail myself of the statute of limitations or interpose any obstacle in defense, and in case I shall sell or otherwise dispose of my interest, I engage that said notes and interest shall be fully paid, to the intent that said Hart shall lose nothing by his forbearance, past or future. This agreement shall be binding on me, my heirs, assigns and legal representatives, and shall inure to the benefit of said Hanson M. Hart, his heirs, executors and assigns.

Dated Springfield, Ill., Jan. 9th, 1895.

P. W. HARTS."

Hanson M. Hart afterward died, and the appellee, Emery, is his executor.

Within less than ten days after the date of the deed from P. W. Harts to the appellant Murray, the latter filed his bill in equity to remove the said trust deed as a cloud upon his title.

Later on, appellees appeared in that suit and answered, and filed their cross-bill, bringing in as new parties the maker of the notes, Poucher, and appellant P. W. Harts.

The object of appellees' cross-bill was to foreclose the trust deed which Harts had assumed to pay. Harts appeared, answered appellees' cross-bill and filed his own cross-bill.

The original bill of Murray and the cross-bill of Harts were dismissed for want of equity, the pleas of each appellant to appellees' cross-bill were overruled, and the present decree upon appellees' cross-bill to foreclose was granted.

The decree finds the amount due and orders a sale of the premises, and provides that a deficiency decree may be entered against appellant Harts, if the sale shall fail to produce enough to satisfy the debt, costs and expenses of sale.



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Murray v. Emery.

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By the acceptance of the deed from Butler containing the assumption clause, Harts assumed and became primarily liable to pay the specified incumbrance. He afterward repeatedly acknowledged such liability by making payments upon the notes each year, for about twenty years, beginning in 1875. Such annual payments are indorsed on the notes as and for annual interest, and whenever their amounts are specified they correspond exactly with the amount of interest due annually at the rate named in the notes. It is insisted that by the terms of the assumption clause in the second deed to Harts he assumed only to pay \$4,125, without interest. Such is not the reasonable construction of that clause, but if it might be given the interpretation contended for, were it standing alone, the subsequent conduct of Harts in paying interest, and the terms of his agreement of January 9, 1895, make his intention positively certain to pay that sum and the interest at the rate provided by the notes.

The continued payment of interest by Harts, and his written acknowledgment and agreement of January 9, 1896, do not need to be argued to effectually destroy Harts' defense of the statute of limitations. The statement of the facts is enough. And Murray's interposition of the statute of limitations is equally unavailing. The right of appellees to foreclose the trust deed continued until the debt itself became barred, and this is so whether applied to Harts or to his grantee. *Richey v. Sinclair*, 167 Ill. 184.

Appellants claim that the honorable chancellor of the Superior Court, who heard the cause, violated the rules of that court in numerous respects, whereby they were greatly injured.

A thorough examination of the record, in respect of the matters referred to, fails to reveal the merits of appellants' contention, or that appellants have placed themselves in a position to successfully urge such matters, if possessed of merit.

As we read the record, the whole case was disposed of together—original bill, pleas and cross-bill—which is gener-

ally the proper practice, and was pursued, in this instance, without timely objection.

We think there was no error in dismissing appellees' cross-bill as to Poucher, the maker of the notes assumed by Harts. He does not appear to have ever had any interest in the land, and as between himself and Harts, he was not even liable on the notes. It is no concern of Harts whether Poucher should or should not be decreed, along with himself, to pay a deficiency, if any, after sale of the premises. Harts could not claim contribution from Poucher, for, as between themselves, Harts alone is liable for the debt. Nor is it any concern of Harts whether Poucher received any consideration for executing the notes, or has been released from their payment by force of the statute of limitations, or in any other way.

When Harts received a conveyance of the land and assumed to pay for it the amount of Poucher's notes, given for a part of a former purchase price, he estopped himself from questioning the regularity or validity of such notes. *Miller v. Robinson Bank*, 34 Ill. App. 460; *Dean v. Walker*, 107 Ill. 540; *Daub v. Englebach*, 109 Ill. 267.

When he pays the amount of the decree here he will have paid only what he agreed to pay for the land. The fact that Poucher, and not Spaulding, made the notes, does not alter the principle so as to relieve Harts from his agreement to pay for the land. Harts' liability, notwithstanding the statute of limitations, seems to be very plain. See *Harts v. Emery*, 84 Ill. App. 316.

Appellants claim that the decree is for too large a sum. After the hearing, and when a computation of the amount due was all that remained to be done, a reference to a master to compute the amount was substantially waived by agreement of the parties. Upon the following day, when the decree was submitted to the court for entry, counsel for appellants suggested that evidence in his control upon the question of what was due might be submitted under appellees' cross-bill, and the court acceded that he might offer such evidence. No evidence was, however, then offered,

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Nortman v. Samonski.

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nor was time requested within which to offer it. We do not think appellants can now be heard to complain in that respect.

We observe nothing further requiring comment, and the decree is affirmed.

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**William T. Nortman v. Geo. A. Samonski.**

1. **ERRORS—Must be Assigned.**—In the absence of an assignment of errors an appellate court will not consider the case, and the judgment of the court below will be affirmed.

**Appeal**, from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed October 27, 1899.

KNIGHT & BROWN, attorneys for appellee.

JAMES J. HOCH, attorney for appellant.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

In this case there is no assignment of errors upon the record. In the absence of an assignment of errors a reviewing court in this State will not consider a case. This has been decided so many times that we shall no longer cite cases upon the point.

The judgment of the Circuit Court is affirmed.

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**Lake Shore Sand Company v. Harry Goodman.**

1. **APPEALS—From Orders Denying Motions—What is Brought Before the Court.**—An appeal from an order denying a motion to set aside a judgment does not bring the whole case before this court for review. It only brings up for review the order from which the appeal was prayed.

**Appeal**, from the Circuit Court of Cook County; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Opinion filed October 27, 1899.

DAVID S. GEEB, attorney for appellant.

NEWMAN, NORTHRUP & LEVINSON, attorneys for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This court has no jurisdiction to consider any alleged error at the trial or in the entering of judgment. Final judgment was entered June 25, 1898, and a motion then made to vacate the same. June 28, 1898, the court below entered the following order, viz.:

“This case coming on to be heard upon the defendant’s motion heretofore entered herein, to vacate the judgment heretofore rendered herein, after argument of counsel and due deliberation by the court, said motion is overruled and denied. Thereupon the defendant having entered its exceptions herein, prays an appeal *from the above order of this court to the Appellate Court in and for the First District of Illinois, which is allowed,*” upon filing bond.

No other appeal is allowed or prayed. Neither are there any affidavits filed, nor is there any testimony taken, nor are there any reasons assigned in support of the motion mentioned in said order. No exceptions are preserved by that order. In *Scanlan v. Wheeler*, 51 Ill. App. 179, the court says: “A recital of that kind by the clerk does not preserve exceptions.” See also *Van Cott v. Sprague*, 5 Ill. App. 99.

An appeal from an order denying a motion to set aside a judgment does not bring the whole case before this court for review. Such an appeal only brings up for review the order from which the appeal was prayed. *National Ins. Co. v. Chamber of Commerce*, 69 Ill. 22, 27; *Fleet v. Gilbert*, 66 Ill. App. 678; *Scanlan v. Wheeler*, 51 Ill. App. 180.

This court is precluded, for want of jurisdiction, from considering, upon this appeal, any of the alleged errors presented by appellant. The judgment of the Circuit Court is therefore affirmed.

**Grand Lodge of the U. S., etc., v. Ohnstein.**

1. **MUTUAL BENEFIT SOCIETIES—Contracts with Members Subject to Law Governing Life Insurance Policies.**—A mutual benefit society is not a life insurance company in the restricted sense in which that term is used in statutes relating to life insurance companies, but membership in such societies is in the nature of a mutual life insurance, and the contract is subject to the rules of law governing life insurance policies, except so far as those rules must be held to be modified by the peculiar organization, object and policy of such societies.

2. **SAME—Designation of Beneficiaries.**—Under a by-law of a mutual benefit society providing that every lodge keep a book in which every member shall declare in writing, upon a blank form provided, to whom the amount of his benefit shall be paid after his death, and requiring that the names of such beneficiaries be written in full, a designation as follows—"Payable to such parties as provided for in my will," is sufficient, and the object of the by-laws substantially attained.

**Assumpsit**, on a beneficiary certificate. Trial in the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed October 27, 1899.

**Statement.**—Appellee sued to recover as one of three beneficiaries of one Lipman Lichtenstein, deceased, who in his lifetime was a member of a subordinate lodge of the Grand Lodge of the United States of the Independent Order of Free Sons of Israel. The endowment laws of the order create an endowment fund, and provisions relating to the present controversy are as follows:

"Section 2. The object of the fund created in Section 1 is to assist widows and orphans, parents and such other beneficiaries as may be designated by the members of this order, in accordance with the laws and rules contained in this article. From this fund shall be paid upon the decease of a member the sum of \$1,000, and this amount shall be paid first to his widow; second, to his children, if he leaves no widow; third, to his parents, if he leaves neither widow nor children.

"No other person shall be entitled to the amount aforesaid, unless a member shall have so designated in writing

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to his lodge in the manner hereinafter provided; provided, however, and in any designation which a member may make, at least \$500 must be left to his widow, and that a member who may be a widower shall leave at least \$500 to his children, which amount may be left to either one or all of them.

"Section 3. Every lodge is in duty bound to keep a book in which each member may, and each member having neither wife, children or parents, shall declare upon a blank form therein provided, to whom the amount provided for in these laws shall be paid after his death," and said blank form being in words as follows:

"Independent Order Free Sons of Israel, \_\_\_\_\_18\_\_\_\_, Lodge No.\_\_\_\_. I, \_\_\_\_\_, hereby direct, in accordance with the endowment laws of the Order of Free Sons of Israel, that the sum of \$1,000 provided for by said laws shall be paid as follows: \_\_\_\_\_ The names of person or persons to whom a brother desires to make a bequest must be written in full. Signed, \_\_\_\_\_. Witness, \_\_\_\_\_.

"Part 3, Article 4, Section 3. A brother, in making his declaration and bequeathing the amount of endowment, or any part thereof, to his wife, shall give in such declaration the full name of said wife, place and date of marriage.

"Designation made upon the aforesaid blank form shall be signed by the member making the same, and shall be witnessed by a brother of the lodge, who shall sign his name thereto as a witness. The declaration shall be arranged so as to secure absolute secrecy for the designation made therein. Such book shall be kept well locked and with proper care by the secretary of the lodge, who shall deliver the same to his successor in office, taking a receipt therefor. Nothing in this section shall be deemed to abrogate any of the provisions of section 2 of this article.

"Section 4. Should any member having neither wife, children nor parents, fail or neglect to make such declaration, as provided in section 3 of this article, the legal amount shall be placed in the endowment reserve fund, providing, however, that if such a member, at his death, does not leave any means, he shall be buried at the expense of the grand lodge of the United States, through the committee on endowment. The amount incurred for that purpose must not exceed \$100, and shall be paid out of the endowment reserve fund."

It appears that there was kept in each lodge a designa-

tion book, in which each member was required to designate the persons to whom, as his beneficiaries, the benefit should be payable. This book was so arranged as to be opened only by a key, and consisted of a compilation of blank forms, filled out by the members respectively. When so filled out such form was covered by a sheet of paper pasted at the edges in such way that the designation so written by the member was concealed, and no one but himself and his witnesses were supposed to know what he had written. Upon the outside of this blank sheet was inscribed the name of the member. After his death the sheet was torn off, thus revealing the written designation of the beneficiaries.

In the present case, Lipman Lichtenstein first designated his wife. She having died, he afterward filled out a second form, as follows:

“Independent Order Free Sons of Israel,

“Moses Lodge, No. 18.

“CHICAGO, January 13, 1891.

“I, L. Lichtenstein, hereby direct, in accordance with the endowment laws of the Order of Free Sons of Israel, that the sum of \$1,000, provided for by said laws, shall be paid as follows: (in writing) *Payable to such parties as provided for in my will.* (The name of the person or persons to whom a brother desires to make a bequest must be written in full.)

“Signed, L. LICHTENSTEIN.”

Lichtenstein died leaving neither widow, children, parents nor descendants of children. He left a will dated February 12, 1891, thirty days subsequent to the date of the foregoing designation.

The provision of his will which, it is claimed, provides for the payment of the \$1,000 to his beneficiaries, under the endowment laws of the appellee, is as follows:

“Tenth. I order that the balance of my estate, being real, personal, and such amount as be derived from life insurance, be divided equally into three parts and distributed as soon after my decease as conveniently may be, two parts ( $\frac{2}{3}$ ) to be delivered to Mrs. Hannal Ohnstein, my sister, and one part ( $\frac{1}{3}$ ) to Julius Ohnstein, my brother-in-law.”

MORAN, KRAUS & MAYER, attorneys for appellant.

HOFHEIMER & PFLAUM, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

It is contended by counsel for appellee that the words "payable to such parties as provided for in my will" are invalid and ineffectual to designate beneficiaries, for lack of conformity to the provisions and requirements of the by-laws.

It is clear that under these by-laws a member having neither wife, children nor parents, may designate other persons as his beneficiaries. The question is whether, in the case before us, the designation as made was sufficient.

It is urged that the clause at the bottom of the designation blank, namely, "The name of the person or persons to whom a brother desires to make a bequest must be written in full," was not literally complied with. It is not denied that in other respects there was substantial compliance. The designation was in writing and was made upon the blank form as required, and if in the will the names of the parties are clearly given to whom the deceased desired this benefit to be paid, the object of the by-laws is substantially attained. The only objection is that he did not write out upon the blank form itself the names of the beneficiaries in full. This objection is purely technical. It might be answered by an argument equally technical, that the clause in question does not by its terms provide that "the names of the persons to whom a brother desires to make a bequest must be written in full," upon the blank form. It merely requires them to be "written in full," and requires that the member "shall declare upon a blank form therein provided to whom the amount provided for \* \* \* shall be paid after his death;" in this case the parties as provided in the will.

It might be thus very plausibly urged that the language of the by-laws and of the clause in question has been literally complied with.

Section 3 of the by-laws prescribes the form of the blank.



It is in the form so prescribed, after the space left for the designation of the beneficiary, and before the signature, that the clause in controversy occurs. It is, apparently, a mere direction to the member, intended to caution him against a failure to clearly identify the payees, in order to avoid mistake or ambiguity. We do not regard it as intended to be a distinct provision, a literal compliance with which is essential to the validity of a designation. If a name should be inserted with one or more initial letters, instead of the full middle names, the direction would not be literally complied with, and yet it would scarcely be seriously contended that for that reason alone there was a substantial failure to comply with the letter and spirit of the by-law, such as to invalidate the designation and deprive the beneficiary of the right to be paid. We regard the designation as substantially in the mode required in the by-laws.

It is said, however, that the beneficiary could not be changed by will, and that there was in this case an attempt to reserve such power. There is no evidence in the case before us that any such change was made, or that more than one will was drawn.

The question is more serious, whether the will in this case contains an actual provision for the payment of this benefit fund to the parties claiming thereunder.

It may be conceded that a designation by will, of persons or purposes outside of what the contract or by laws of the appellant permit, could not be allowed. It is only where the designation by will is substantially in accordance with the contract that it can be deemed valid. It is not contended in this case that the persons designated, and whose names are given in the will, are not competent as beneficiaries under the by-laws of the order, if they have been properly and clearly designated, in compliance with those by-laws. But it is urged that, even if the designation by the deceased upon the blank form provided be deemed sufficient, the language of the will fails to provide expressly or clearly for the payment of this fund in controversy.

The testator directs that the balance of his estate, "being real, personal, and such amount as be derived from life insurance," be divided between appellee and the sister of the testator. Can this language be properly held to describe the fund to which his beneficiaries, namely, "such parties as provided for in my will," would be entitled? This must be determined from the will itself. "The intention must be so clear that no other reasonable intention can be imputed to the will." *Arthur v. The Odd Fellows Beneficial Association of Columbus*, 29 Ohio St. 557. In *Martin v. Stubbings*, 126 Ill. 387, on page 403, it is said :

"A mutual benefit society is not a life insurance company, in the restricted sense in which that term is used in our statute in relation to life insurance companies, nor is a certificate of membership in such society a policy of life insurance in the same restricted sense of the term, yet it is manifest that such membership certificate is in the nature of a mutual life insurance policy. \* \* \* Such contracts are, therefore, subject to the rules of law governing life insurance policies, except so far as those rules must be held to be modified by the peculiar organization, object and policy of such societies."

The section of the by-laws of the order which creates the endowment fund under consideration, also provides that "each member shall be entitled to the benefits of said fund as hereinafter provided;" and the next section states the object of the fund to be to "assist widows and orphans, parents, and such other beneficiaries as may be designated by the members of the order;" and provides that payment from it shall be made upon the decease of the member. It is therefore, we think, evident that the endowment fund is in the nature of life insurance in the same way, and to the same extent, as a membership certificate in an ordinary mutual benefit society. If we are right in this conclusion, then the provision of the will disposing of such amount as should be "derived from life insurance" includes the fund in controversy, and is a sufficient designation of the particular fund which was, by the member's appointment, made "payable to such parties as provided for in my will." Appel-

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lee was one of these parties. As is said in *Order of Foresters v. Malloy*, 169 Ill. 58:

"The implication to be drawn from the language of the will, that the testator possibly regarded the endowment as a part of his estate, can have no effect to defeat the manifest intention that appellee should receive it."

In that case, also, the word "insurance" was used to designate the benefit, and it was described as "insurance in the Order of Catholic Foresters." In the case before us the will must be considered as a document referred to in the member's designation of the beneficiaries, as containing the names of the latter, and the two together—the designation and the will—as indicating the intention of the deceased member. This intention, when thus clearly made manifest, "ought to be observed and carried out," unless inconsistent with the objects and aims of the order, and the rules of law applicable. (See *Alexander v. Parker*, 42 Ill. App. 465.) No such inconsistency appears.

The judgment of the Circuit Court must be affirmed.

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Christina G. Bock v. Ludwig Schindler.

1. **FRAUD—Upon Creditors—Chattel Mortgages.**—Where the indebtedness secured by a chattel mortgage matured within eight months, except a note for the nominal sum of \$3. maturing in two years, and the indebtedness was divided in that way so that a verbal extension could be given of time of payment of the principal indebtedness, such an extension is a fraud upon creditors of the mortgagor.

2. **SAME—Delay in Foreclosing.**—Permitting mortgaged property to remain in the possession of the mortgagor after the maturity of all the indebtedness is a fraud *per se* as to other creditors.

**Replevin.**—Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed October 27, 1899.

J. HENRY KRAFT, attorney for appellant.

RUBENS, DUPUY & FISCHER, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

Appellant's claim and rights, if any she has under the issues in this case, are based entirely upon a chattel mortgage. That mortgage was made by Martin Bock (husband of appellant), dated June 18, 1892, and was given to secure seven notes made by said Martin, bearing even date with said mortgage. Five of said notes are for the sum of \$100 each, and payable, respectively, three, four, five, six and seven months after date; one is for the sum of \$93, payable eight months after date; and one for the sum of \$3, payable two years after date. Said mortgage is made to "The Mearle & Heaney Mnf'g Co." and said notes are all payable to the order of that company. Indorsed on the back of said mortgage is what purports to be an assignment thereof to "C. G. Bock." Upon the back of each of said notes is indorsed what purports to be a transfer thereof to "C. G. Bock, without recourse." All of said indorsements are without date. June 9, 1894, Christina G. and Martin Bock made an affidavit for the purpose of extending said mortgage two years under the provisions of the statute in that regard.

After the giving of said mortgage, said Martin Bock gave another mortgage conveying the property in question. Said property was sold under this last named mortgage, and the title acquired by such sale passed by *mesne* conveyances to the appellee. No question is made as to the validity of this sale, or the conveyances to appellee. After appellee acquired the title to said property appellant seized and took the same from the possession of appellee, claiming to do so under and by virtue of said first mentioned mortgage. Thereupon appellee commenced this suit in replevin, and thereby regained possession of said property.

The cause was submitted to the court for trial, a jury being waived. The finding and judgment of the trial court are in favor of the plaintiff in the replevin (appellee).

James P. Heaney, president of the company named as payee in said notes, testified that said notes were paid by the maker thereof, Martin Bock, before they were trans-

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ferred to his wife, the appellant. There is no testimony in conflict with that statement by Mr. Heaney. That is conclusive of this case, if there were no other reasons for affirming the judgment of the trial court.

But if said notes were not paid, the first mentioned mortgage could not be enforced as against appellee. All of the indebtedness secured thereby matured within eight months, except the note for the nominal sum of \$3. It appears in the record that the indebtedness was divided in that way so that a verbal extension could be given of time of payment of the principal notes. Such an extension would be a fraud upon creditors of the mortgagor. *Jones v. Noel*, 38 Ill. App. 374, 378.

Under the facts and circumstances in the case at bar, as they appear in this record, permitting the property in question to remain in the possession of the mortgagor after the maturity of all the indebtedness except the note for the nominal sum of \$3, was a fraud *per se* as to other creditors. *Hixon v. Mullikin*, 18 Ill. App. 232.

But if the trial court decided the case upon the ground of actual fraud we are not prepared to say that such finding is against the weight of evidence. Appellant was not present and had nothing to do with said assignment and transfer of notes and mortgage. Mr. Heaney says that he never saw her, and that Mr. Bock procured the making of said assignment of mortgage. When asked if he could remember what Mr. Bock said at the time, he gave this reply, viz.:

“Well, not exactly. I remember him saying something about wanting to get ahead of somebody, or something to that effect.”

Mr. Bock, though present in court at the time, made no reply to that testimony of Mr. Heaney.

Perceiving no reversible error in this record, the judgment of the Superior Court is affirmed.

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110	454
85	364
114	18

### John Farson et al. v. James H. Gilbert, for use, etc.

1. **REPLEVIN**—*Effect of Dismissing the Suit*.—By permitting the suit in replevin to be dismissed for want of prosecution, the plaintiff loses his right, when defending a suit upon the bond, to contest claims to the property, except to plead and prove his title in mitigation of damages.

2. **DAMAGES**—*In Suits on Replevin Bonds*.—The amount stated in the replevin affidavit is *prima facie*, but not conclusive, evidence of the value of the property in question, and either party may, in a suit upon a replevin bond, show by parol evidence the actual value of the property that the defendant failed to return.

**Debt, on a replevin bond.** Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed October 27, 1899.

FARSON & GREENFIELD, attorneys for appellants.

Where the plaintiff in the replevin suit takes a nonsuit, and judgment is entered against him for costs and for a return of the property, nothing is determined as to the title of the property or the merits of the controversy, and the plaintiff in the replevin suit, when sued on the bond, may plead and prove his title to the property in mitigation of damages. Starr & Curtis' Ann. Stat., Chap. 119, Sec. 26, title, Replevin; Hanchett v. Gardner, 138 Ill. 571; Rankin v. Kinsey, 7 Ill. App. 215; Morehead v. Yeasel, 10 Ill. App. 263; Schweer v. Schwabacher, 17 Ill. App. 78; Wells on Replevin, Sec. 589.

BULKLEY, GRAY & MORE, attorneys for appellees.

That the affidavit of replevin is sufficient evidence of the value of the property taken in a suit on the replevin bond, if the plaintiff in the suit on the bond is satisfied therewith, there can be no question. The defendants in the suit on the bond are estopped to deny that the property was not worth the amount so stated. The plaintiff, however, may prove a greater value. O'Donnell v. Colby, 55 Ill. App. 112; Washington Ice Co. v. Webster, 125 U. S. 426; Wells on Replevin, Secs. 453, 569, 660.

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Such value also precludes the surety who signed the bond. Wells on Replevin, Sec. 453.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This is a suit upon a replevin bond given by appellants to James H. Gilbert, sheriff, etc., to indemnify him for the taking by replevin writ of certain property. The replevin suit was dismissed for want of prosecution, and this suit upon the bond followed.

The property belonged to one Thayer, and was taken by the replevin writ from the possession of Donohue & Henneberry, the uses for whose benefit this suit upon the bond is prosecuted, and they had such possession from a time long anterior to the giving of the chattel mortgage through or under which appellants claimed title and the right of possession.

We see no reason for disturbing the verdict and judgment, except for the one matter of damages, and therefore discuss only that question, leaving both parties unprejudiced in another trial by any comment of ours upon other questions.

By permitting their replevin suit to be dismissed for want of prosecution appellants lost all right, in a suit upon the bond, to contest Donohue & Henneberry's claim to the property, except that saved to them by the statute, which was to plead and prove their title in mitigation of damages. *Stevison v. Earnest*, 80 Ill. 513; *Hanchett v. Gardner*, 138 Ill. 571.

The property consisted of ninety-one certain electro plates of pages of a publication called Cram's Imperial Office Directory and Reference Atlas of the United States.

The affidavit in replevin states the value of said property at \$1,100.

We have no decision by the Supreme Court of this State upon the question of the effect to be given, in a suit upon the replevin bond, to the value so fixed by the plaintiff in the replevin suit. It has been sometimes said, by other authorities, that the plaintiff in replevin, who has fixed the

value of the property by his statement in his affidavit for the writ, is estopped from afterward asserting a different value when sued upon his bond. Wells on Replevin, Secs. 453, 569, 660.

But such a rule would many times operate very harshly and unreasonably. It is common knowledge that such statement of value is usually made without a very nice attention to the real value of the property, but is made largely as an estimate, based somewhat upon the amount of the plaintiff's claim, lest under some circumstances the jury might not, perhaps, be at liberty to give him more than the value he had himself estimated.

The effect of a rule that the amount set out in the replevin affidavit is conclusive evidence of the value of the property, in a suit upon the bond, would often be liable to work serious injustice, and such would be especially true in cases like the present, between lien holders. Upon careful consideration, we regard the better rule to be as stated in *Gibbs v. Bartlett*, 2 Watts & Serg. 29, viz.: "It (the amount stated in the replevin affidavit) has ever been considered as *prima facie*, but not conclusive evidence."

In accordance with such rule, either party should, in a suit upon the replevin bond, be permitted to show by parol evidence the actual value of the property the defendant has failed to return.

In an action of covenant or debt, on a bond with a condition, the true measure of damages is the loss sustained by the covenantee or obligee. *Dehler v. Held*, 50 Ill. 491.

The only evidence in the record of the value of the electro plates, aside from that stated in the affidavit for replevin, is that of George F. Cram, who testified that he was the owner of Cram's Imperial Atlas and Office Directory, and the copyrights connected therewith, and had purchased from appellants the electro plates in question; that the plates have no market value, and no value outside of their connection with the publication referred to, except the value of old metal, which is merely nominal.

Being asked by counsel for appellants what he paid for



them, appellees interposed an objection, which was properly sustained.

Manifestly, plates like the ones in question can not be rightfully used for the purposes for which they were made, except in connection with the copyrighted publication, and the testimony of the witness that they possess only a nominal value outside of connection with such publication is obviously true, and is, we think, sufficient to overcome the *prima facie* case of value made by the replevin affidavit.

It appears inferentially that none of the parties to this controversy have any interest in the copyright, and it is plain that the jury had no sufficient basis to fix appellees' damages at the full amount of their claim against the general owner of the plates—a sum far in excess of a nominal one—and attorney's fees in the replevin suit.

Appellees offered no evidence of the value of the plates, except such as the affidavit in replevin furnished, but tried the case upon the theory that they were entitled to recover the full amount of their special interest in them as pledgees, up to at least the extent of their value as stated in the replevin affidavit. But from what we have said it will be seen we regard such as being an erroneous theory. We see no objection to the action of the trial court in the admission or rejection of evidence, or in the giving and refusal of instructions, but the damages given by the jury are so excessive under the evidence that the case should be tried again. Reversed and remanded.

### Chicago City Ry. Co. v. Margaret Keenan.

1. INSTRUCTIONS—*As to Number and Intelligence of Witnesses.*—The giving of an instruction that the jury are at liberty to decide that the preponderance of evidence is on the side which, in their judgment, is sustained by the more intelligent, the better informed, the more credible and the more disinterested witnesses, whether these are the greater or the smaller number, is substantial error, and consists in a virtual declaration by the court that the preponderance of evidence lies

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on the side on which the most intelligent and best informed witnesses have testified.

2. JURIES—*Their Province to Weigh all the Evidence and Determine for Themselves Where it Preponderates.*—It is the peculiar province of juries to properly weigh all the evidence and determine for themselves where it preponderates.

**Action in Case, for personal injuries.** Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed October 27, 1899.

WILLIAM J. HYNES and SAMUEL S. PAGE, attorneys for appellant.

SULLIVAN & McARDLE, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This is an appeal from a judgment recovered for injuries to the person of appellee through the alleged negligence of appellant.

A large number of witnesses testified at the trial, of whom about twice as many testified for the appellant as for appellee.

Presumably, for the purpose of obviating the possible effect of such preponderance in numbers against her, appellee's counsel offered the following instruction, which was given:

"The jury are instructed that the fact that the number of witnesses testifying on one side is larger than the number testifying on the other side, does not necessarily alone determine that the preponderance of evidence is on the side for which the larger number testified. In order to determine that question the jury must be governed by and take into consideration the appearance and conduct of the witnesses while testifying; the apparent truthfulness of their testimony, or the lack of it; their apparent intelligence, or the lack of it; their opportunity of knowing or seeing the facts or subjects concerning which they have testified, or the absence of such opportunity; their interest or their absence of interest in the result of the case; and from all these facts, as shown by the evidence, and from the

## Columbia Casino Co. v. World's Columbian Exposition.

other facts and circumstances as shown, the jury must decide on which side is the preponderance. After fairly and impartially considering and weighing all the evidence in this case, as herein suggested, the jury are at liberty to decide that the preponderance of evidence is on the side which, in their judgment, is sustained by the more intelligent, the better informed, the more credible and the more disinterested witnesses, whether these are the greater or the smaller number."

Similar instructions were condemned in *Eastman v. West Chicago St. R. R. Co.*, 79 Ill. App. 585, and *Barron v. Burke*, 82 Ill. App. 116, where the giving of them was held to be substantial error.

The chief vice of the instruction, in our opinion, consists in a virtual declaration by the court to the jury that the preponderance of evidence lies on the side on which the most intelligent and best informed witnesses have testified.

The law does not, as a general proposition, graduate intelligence and information into degrees, and it was a clear invasion of the province of the jury to instruct them where the weight of evidence was to be found in a case where the evidence was voluminous and in sharp conflict. It is the peculiar province of the jury to properly weigh all the evidence and determine for themselves where it preponderates. Reversed and remanded.

## Columbia Casino Co. v. World's Columbian Exposition.

1. **SPECIFIC PERFORMANCE**—*Where a Bill Will Not Lie*.—A bill for specific performance will not lie on a creditor's claim for money alleged to be due on a contract against an insolvent, whose estate has been properly brought within the jurisdiction of a court of equity.

2. **CONTRACTS**—*When in Writing—Evidence of What the Contract is*.—Where parties deliberately put their contract in writing, the written instrument is the exclusive evidence of what the contract is, and in such cases intrinsic evidence is not admissible.

3. **SEAL**—*Not Indispensable on Contract of Corporations*.—Affixing

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the corporate seal to an agreement is not necessary to bind a corporation.

4. **PRESUMPTIONS**—*In Support of Decrees*.—Where the court in its decree not only confirms the master's report but finds specifically other facts in addition to the testimony of the witnesses produced by plaintiff in error before the master, it will be presumed that the evidence, if any is omitted from the transcript of the record, justified the decree.

**Creditor's Bill**.—Error to the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed November 2, 1899.

**Statement**.—On a creditor's bill filed by Benjamin D. Anguish and others against plaintiff in error, July 8, 1893, two receivers were appointed. September 11, 1893, defendant in error filed in said suit its intervening petition, setting up a written contract between it and plaintiff in error, of date August 12, 1892, by which defendant in error granted to plaintiff in error the entire Casino building, with the exception of the ground floor, situated on the grounds of defendant in error, in the city of Chicago, to hold the same from April 1, 1893, until forty-four days after the close of the World's Columbian Exposition, and also the right to conduct in said building a restaurant where meals, lunches, refreshments and drinks, including tea, coffee and cigars, beer, mineral water, and all kinds of wines and cordials, might be obtained. Plaintiff in error, agreed, among other things, that it would pay to defendant in error five-sixths of the actual cost of the construction of said building, \$20,000 of said cost to be paid on signing the contract, and the remainder to be paid on demand as the construction progressed; also that it would faithfully account for and pay to defendant in error twenty-five per cent of its gross receipts, settlements to be had and payments to be made each day for the previous day's business, at such time as should be designated by defendant in error; that the method of arriving at such gross receipts should be such as would be approved by defendant in error, and that said Casino Company would keep true and full accounts of its receipts, which should be open to the inspection of the defendant in error

at any time during business hours. Defendant in error agreed that it would conduct its water sewerage, steam, gas and electric light system to said building, and would allow the use of said systems and of the cold-storage system on the same basis as given to others holding similar rights.

The petition of defendant in error alleges the appointment of receivers July 8, 1893, and that they had entered into possession of the property and were conducting the business of the Casino Company; that, although frequently requested so to do, they had refused to pay to petitioner any portion of the receipts of the business, and that there is due and owing to petitioner on account of twenty-five per cent of the business done by the receivers up to and including September 7, 1893, \$2,711.16; that the receivers, since assuming control of the business, have been using petitioner's electric light system and paying nothing therefor, and that they are indebted therefor up to and including September 1, 1893, in the sum of about \$2,005.25. It is further alleged in the petition that July 1, 1893, there was an adjustment between petitioner and plaintiff in error of all matters of difference between them, except construction matters, and it was agreed between them that plaintiff in error owed to petitioner, up to and including June 20, 1893, after allowance of all claims of plaintiff in error, except on account of construction matters, the sum of \$8,343.75, on account of petitioner's twenty-five per cent of the gross receipts of said business, and upon said settlement being made, the following agreement was executed by the parties:

"This agreement between the World's Columbian Exposition and the Columbia Casino Company, witnesseth: That all matters and differences (excepting claim of both parties on account of construction matters) between the said parties have this day been settled, compromised and adjusted as follows, to wit: After allowing to said Columbia Casino Company all claims and demands of every kind and nature, it owed to the said Columbian Exposition Company on and including June 20, 1893, the sum of \$8,343.75, which said Columbia Casino Company agrees to pay, as follows: \$543.75 cash in hand, for which a check is given of even date with this agreement; \$2,000 of the remainder to be paid October

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15, 1895, without interest. On July 15th said Columbia Casino Company shall pay to said Exposition, twenty-five per cent in addition to the daily audits of its gross receipts for July 4, 1893, from all sources. On Saturday, July 8th, said Columbia Casino Company shall pay to said Exposition \$1,000. As to the remainder of said indebtedness, said Columbia Casino Company shall, in addition to and exclusive of its daily audits, pay the same at the rate of \$100 per day, beginning July 10, 1893, and continue on each succeeding day thereafter until the whole sum shall be paid, excepting the \$2,000 hereinbefore mentioned to be paid October 15, 1893.

July 1, 1893.

COLUMBIA CASINO COMPANY,

By H. D. Kochersperger, President.

ADOLPH NATHAN,

Chairman Committee on Adjustment,  
World's Columbian Exposition."

That in consideration of the premises plaintiff in error executed its receipt to petitioner for \$2,621.25 in full payment of all claims and demands, with the single exception of a claim made by it on account of construction, which claim was not admitted by petitioner; that said sum of \$543.75, agreed to be paid was not paid, nor has any payment been made by plaintiff in error since the making of said agreement; that up to the time of the appointment of the receivers and their assumption of said business, there was due petitioner under said settlement \$8,243.75, and in addition thereto, for amounts accruing subsequently to June 20th, and up to and including July 6, 1893, a further sum on account of said 25 per cent of receipts, of \$2,765.69; and in a further sum of \$1,360 for electric light service from June 20th to and including July 5th; making in all \$12,569.44. The petition then alleges that the receivers have on hand a large sum of money, and are doing a large and profitable business, and prays for an order directing them to pay petitioner the amounts due them, and also that they pay petitioner, day by day, 25 per cent of the gross receipts of the business, as per the contract, and for electric light service, etc.

November 7, 1894, the following occurred :

“On motion of solicitor it is ordered that leave be and is hereby granted the defendant, Columbia Casino Company, to file objections to the intervening petition of the World's Columbian Exposition within five days from this date, conditional, by agreement of parties in open court, that the testimony taken on former reference, upon objecting creditors to claims of World's Columbian Exposition to be read by either party, with leave to parties to take additional testimony.”

November 12, 1894, plaintiff in error filed objections, and they were referred to the master to take proof and report, with his opinion as to the law and evidence. Evidence was taken before the master, who reported, recommending that the objections of plaintiff in error be not sustained, and finding that there was due from the receivers to defendant in error the sum of \$34,799.74. Objections filed before the master were ordered to stand as exceptions, and the court, November 23, 1896, overruled the exceptions, affirmed the master's report, and decreed that the receivers should pay to defendant in error the sum of \$25,000 to apply on the amount found due by the master, the remainder of said amount to abide the further order of the court. To reverse the decree so rendered this writ of error was sued out. Contained in the printed argument of counsel for defendant in error are what purport to be certified copies of two orders, one of date October 4, 1893, and the other of date February 10, 1897. Neither of these orders appears in the transcript filed by plaintiff in error, and no additional or supplemental transcript has been filed by either party. No such orders, therefore, are before us for consideration. The objections filed by plaintiff in error are very lengthy. The main objections are as follows:

“That in order to induce this objector to enter into said written contract and to provide for and bear the very large percentage of the cost of said Casino building, which in said contract was stipulated to be paid by this objector, the said Exposition, through its directors and officers, acting in that behalf, at all times stated and represented to this ob-

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jector, and its officers and promoters, both before the execution of said writing, in the negotiations that were then held, and after said writing was made, but before the expenditures called for thereunder were made by this objector, that there would be secured to this objector, upon condition, and as a result of its executing said writing, a substantial monopoly of the furnishing in said Exposition grounds of hot meals; and in this connection the World's Columbian Exposition and its agents and officers, as an inducement to this objector to execute said writing and to make the payments that were to be made by this objector thereunder, represented and promised to this objector, and its promoters and officers, that there would not and should not be granted any other concession by said World's Columbian Exposition under which a kitchen could be erected on said grounds and cooking be done and hot meals prepared and served anywhere within said Exposition grounds, exclusive of the Midway Plaisance, except a permit to the Clam Bake, and that would be only for a fish dinner, and for the further exception of the Administration Building, where meals would be furnished to the officers of the World's Columbian Exposition only, and their guests;" and that, relying on said representations and promises, objector made large expenditures, etc. That after said contract was executed, and after moneys had been paid by objector to defendant in error, the latter granted numerous concessions, amounting to more than twenty, to divers persons, corporations and associations, for the preparation and serving of hot meals in competition with objector, whereby large profits were lost to objector. The objector admits the execution of the agreement of July 1, 1893, set forth in the intervening petition, but alleges that Kochersperger, president of plaintiff in error, was ignorant of the negotiations prior to the execution of the contract of August 12, 1893, and that the making of the settlement of July 1, 1893, was not within his power.

Damages are claimed, alleged to have been sustained by reason of the failure of defendant in error to comply with its said promises, etc., and by reason of other alleged de-



faults of defendant in error. Objector, apparently treating its objections as an answer, concludes its objections with a prayer that the contract of August 12th be amended, if deemed necessary; that the claim of defendant in error be denied, for an accounting, and that defendant in error may be decreed to pay the balance which may be found due to the objector, etc.

WILLIAM P. BLACK, attorney for plaintiff in error.

WALKER & PAYNE, attorneys for defendant in error.

MR. JUSTICE ADAMS delivered the opinion of the court.

Counsel for plaintiff in error assumes in his argument that the intervening petition of defendant in error is in substance a bill for specific performance, and much of his argument is based on this assumption. The intervening petition is merely a creditor's claim against an insolvent whose estate has been properly brought within the jurisdiction of a court of equity, and is solely for money alleged to be due on a contract. In such case a bill for specific performance will not lie. *Pierce et al. v. Plumb*, 74 Ill. 326; *Barton v. DeWolf*, 108 Ib. 195.

The claim of defendant in error, although filed in a suit in equity, is a legal claim, and not merely one of which only a court of equity could entertain jurisdiction. The master finds:

"It is contended by the Columbia Casino Company that, pending the negotiations for the concessions prior to the date of said contract, August 12, 1892, the World's Columbian Exposition, through its representatives, promised the Casino Company that it should have a concession for the exclusive right to furnish hot meals and liquors during the continuance of the Exposition, to all visitors to the grounds, and that such monopoly constituted the real consideration for the contract of August 12, 1892, on the part of the objector; that a clause should be inserted in said 'Exhibit A' to that effect; that the omission of such clause was a fraud on this objector.

"I find from the evidence such promises were made prior

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to the execution of said contract, and that upon the draft of the contract, without such restrictive clause having been submitted to the Casino Company prior to its execution, said Casino Company applied to the Exposition to have such clause inserted in said contract, and was met with a refusal on the part of such Exposition to allow such restriction; that after such refusal by said Exposition said contract was executed by said Casino Company; that said contract expressed the final agreement between the World's Columbian Exposition and the Columbia Casino Company, that all prior talks and negotiations were settled by and merged in said written contract.

"I find that from the evidence no damages are proved for excessive charges on the part of the World's Columbian Exposition for the construction of the Casino building; that all other matters were adjusted and settled."

The findings of fact are fully sustained by the evidence.

Ernst Saddler, who was president of the Casino Company, before and at the time the contract was signed, testifying in regard to the alleged representations of defendant in error that plaintiff in error would have an exclusive right or monopoly, says: "These representations were made before we made the first payment." Kirton, attorney for plaintiff in error, of whom Mr. Saddler testified, "The negotiations were left principally in his hands," testified: "The signing of the contract and the payment of the \$20,000 were contemporaneous." The \$20,000 was the first payment.

Kirton's evidence also shows that all talk of exclusive right in plaintiff in error occurred prior to the execution of the contract, and also that when the contract was submitted to plaintiff in error no objection was made that it omitted to provide for such exclusive right. Kirton testified that two or three weeks before the first payment was made it was "submitted to us" unsigned; that he would not say that during that time all the officers of plaintiff in error considered it, but that some of them did; that he, Kirton, during that time had the contract at his office; that he was dissatisfied with it, and expressed his dissatisfaction to Mr. Carlisle, the attorney for the Exposition Company, but the company refused to alter it. Subsequently, on being re-

called, he testified that in his interviews with Mr. Carlisle the question of an agreement that plaintiff in error was to have an exclusive right was not discussed.

The following occurred in the examination of Mr. Sadler:

Q. "Did you personally examine the concession in writing executed by the Exposition Company at the time of the payment of the \$20,000?" A. "I read the contract, but Mr. Kirton was appointed a committee to attend to those things, and of course I left the whole thing to him, he being the attorney for the company."

The president of plaintiff in error read the contract before signing it, the payment of the \$20,000, which was the first payment, and the signing, being contemporaneous. Kirton, the attorney for plaintiff in error and the committee having charge of the matter, had it in his possession for weeks before it was signed, and evidently read it, because he says he expressed dissatisfaction with it, and he knew that defendant in error refused to alter it. Under these circumstances, which completely exclude the idea of mutual mistake, or of fraud on the defendant in error, the contract was executed by plaintiff in error. That it can not now be varied by oral testimony materially affecting its terms, is a proposition too thoroughly settled to admit of serious discussion.

"Where parties have deliberately put their contract into writing, the rule doubtless is, that the written instrument is the exclusive evidence of what the contract is." *Memory v. Niepert*, 131 Ill. 628, 630. And in such case extrinsic evidence is inadmissible. *Weaver v. Fries*, 85 Ill. 356; *Wabash Ry. Co. v. McKittrick*, 36 Ill. App. 83.

We agree with the master's finding, that no damages were proved on account of construction, which was the only matter omitted from the settlement of July 1, 1893. There was no proof of the allegation in the objections of plaintiff in error that Mr. Kochersperger, its president, was not aware of the negotiations antecedent to the execution of the contract, and the allegation that he was powerless to make the settlement, we do not think sustained. President Kochers-

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perger testified: "I know at the meeting, I think both of the directors and stockholders, there was a committee appointed, of whom I was one, to adjust the matters in regard to the concession of percentage between the Casino Company and the World's Fair people." He further testified: "The matter that they intended to adjust was the matter of the twenty-five per cent," etc.

Now, the power to adjust the percentage necessarily included the power to adjust and determine the amount, if anything, which the Casino Company should pay to the Exposition Company, and in determining that, if it appeared that the former company had any just claim against the latter, such claim was a proper matter for consideration and settlement, because, on the amount of such claim being ascertained, it was proper to deduct it from the total amount of the percentage found due to the Exposition Company. It appears from the agreement of settlement that this was done as to all claims of plaintiff in error for damages, except its claim on account of construction matters, in respect to which no evidence was produced before the master. The agreement of July 1, 1893, being signed in the name of plaintiff in error, and by the proper officers, the authority to execute it will be presumed in the absence of evidence to the contrary. Cook on Stock and Stockholders, etc., Sec. 723.

The affixing the corporate seal to the agreement was not necessary to bind the corporation. *Ib.*, Sec. 721. All damage in respect to which evidence was given, occurred prior to June 20, 1893, and must therefore be presumed to have been included in the settlement of July 1, 1893.

As has been stated, a condition of the permission granted to plaintiff in error to file objections was, that the testimony taken on a former reference upon objecting creditors to claims of World's Columbian Exposition might be read by either party. This condition was agreed to by the parties in open court. The only evidence in the record is the testimony produced before the master by plaintiff in error in support of its objections. The master says in his report:

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"I have taken the depositions of sundry witnesses, together with sundry files and documents, and from the evidence submitted I find," etc. The decree recites, "And thereupon said cause coming on for final hearing upon the petition of the intervention of the World's Columbian Exposition and the answer thereto, and upon the reports of Jeremiah Leaming, one of the masters of this court, filed herein on the 6th day of July, 1894, and on July 3, 1893, respectively, and upon the testimony, proofs and exhibits taken by the respective parties before said master, and returned by him with and as a part of his report," etc.

It is manifest from the foregoing that evidence was submitted to and considered by the master and also by the court, in addition to the testimony of the witnesses produced by plaintiff in error before the master. The court, in its decree, not only confirmed the master's report, thus finding, as we think, the facts as did the master, but found specifically that the sum of \$25,000 was due from the Columbia Casino Company to the World's Columbian Exposition. In such case it must be presumed that the evidence omitted from the transcript of the record justified the decree. *Allen v. LeMoynes*, 102 Ill. 25. The decree will be affirmed.

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**Cragin Manufacturing Co. v. Geuder & Paeschke  
Manufacturing Co.**

1. **SET-OFF—Must be Mutual.**—In a suit between two corporations the defendant can not set off an individual claim against an officer of the suing company.

**Error** to the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed October 19, 1899. Rehearing denied November 20, 1899.

**Statement.**—In May, 1889, plaintiff in error made a general assignment for the benefit of its creditors to William A. Montgomery.

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The assignee sold certain of the assets, consisting of merchandise, to defendant in error. The precise terms of the sale are matter of controversy. Defendant in error admits that there is due for such merchandise \$238.15. The assignee claimed \$568. Suit was begun by the assignee to recover this amount. While the suit was pending the voluntary assignment proceedings were terminated and the insolvent estate settled, and re-assignment made of this claim to the plaintiff in error. Thereupon the plaintiff in error was substituted as party plaintiff in the court below in the place of the assignee. Defendant in error pleaded the general issue and set-off. The set-off was claimed by reason of another transaction in relation to other assets of the insolvent estate. These other assets were machinery, dies, etc., which the defendant in error attempted to purchase of the assignee. Defendant in error wished to make the purchase upon time payment. Effort was made to effect the sale by the assignee upon such terms, but the County Court wherein the insolvent estate was being administered, would not permit the assignee to sell the assets except for cash. The former president of the insolvent company, W. P. Cragin, then purchased the assets in question (together with a certain patent right, which Cragin retained and did not sell to defendant in error) for cash, and he in turn sold them to defendant in error upon time payment, taking the promissory notes of defendant in error for the amount of the purchase price. W. P. Cragin paid to the assignee for all the assets bought by him \$5,250, and sold them (excepting the one patent) for \$5,000, to defendant in error. The officers of defendant in error knew that it was purchasing from W. P. Cragin and that the assignee had refused to sell to it upon the terms proposed. The goods were invoiced by W. P. Cragin to defendant in error. The promissory notes for purchase price were made payable to the order of W. P. Cragin. The assignee had, before the sale by W. P. Cragin to defendant in error, petitioned the County Court for leave to sell the assets in question, together with the patent right, to W. P. Cragin, for \$5,250 cash.

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An order was entered by that court granting leave to sell to W. P. Cragin upon those terms, and after sale another order was entered confirming the sale to him. The set-off claimed by the defendant in error in this suit is for breach of contract of sale of these assets to it by reason of failure to deliver part of the assets which it purchased from W. P. Cragin and paid for to him. Evidence was admitted to show that the purchase by Cragin from the assignee and the sale by Cragin to defendant in error were transactions had because of the refusal of the County Court to permit the sale to be made by the assignee to defendant in error. The jury found the issues for defendant in error, and assessed its damages upon the claim of set-off, deducting therefrom the amount which they found due to plaintiff in error upon the sale of the merchandise. The amount of the damages thus assessed was \$504.85. Defendant in error remitted the amount of \$307.65 from this verdict. The trial court entered judgment upon the verdict thus reduced from which judgment this appeal is prosecuted.

LOUIS E. HART, attorney for plaintiff in error.

BULKLEY, GRAY & MORE, attorneys for defendant in error.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

We are unable to see how the claim of set-off presented by defendant in error can be maintained against plaintiff in error, the Cragin Manufacturing Company, when the transaction upon which the claim is based was had with W. P. Cragin, in his individual capacity. It is not controverted that the assignee of plaintiff in error sold the machinery, dies, etc., in question to W. P. Cragin, nor that defendant in error purchased them from W. P. Cragin. It is undisputed that the County Court would not permit the assignee of plaintiff in error to sell these assets to defendant in error upon the terms proposed. It does not matter that

W. P. Cragin would not have purchased them had not the County Court thus refused to let them be sold to defendant in error by the assignee. As a matter of fact the assignee did not, and could not, make this sale by reason of the control of the County Court, and hence, it seems clear, there can be no liability of assignee or plaintiff in error for breach of a contract of sale which was not, and could not be, made by either. There is no need to cite authorities to the effect that a claim of set-off must be mutual. This was not a claim mutual as between plaintiff and defendant.

Other questions raised by counsel relating to the nature of the damages claimed by way of set-off, whether liquidated or unliquidated, and questions relating to the sufficiency of proof of value of articles of machinery, dies, patent right, etc., parts of the goods sold by W. P. Cragin to defendant in error, become unimportant here by reason of the conclusion reached by the court.

The judgment is reversed and the cause remanded.

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### Carrie Kinsella v. Ida Cahn et al.

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1. **WAIVER—Of Defects in a Service.**—Where a defendant in a foreclosure proceeding appears and demurs to the bill, which is overruled, and answers, defects in the summons and sheriff's return of service are waived.

2. **EQUITY PRACTICE—Practice Before the Master.**—It is the duty of counsel to interpose objections to the master's report, if he has any, so as to afford the master an opportunity to modify his report, if it is wrong, and if the master, after hearing the objections, declines to change his report, it is the duty of the objecting party, after the report has been filed in court, to file his objections there. When this has not been done and no sufficient reason assigned for not doing so, the report of the master, when approved, will be deemed conclusive upon the questions covered by it.

**Foreclosure Proceedings.**—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed November 7, 1899.



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Kinsella v. Cahn.

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L. M. ACKLEY, attorney for appellant.

FELSENTHAL & D'ANCONA, attorneys for appellees.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is an appeal from a foreclosure decree. It is first insisted by appellant that the court erred in denying a motion to quash the sheriff's return of service and the summons, upon the ground that the copy served was not properly certified.

It is sufficient to say that even if it should be conceded that the point is well taken, it has been waived. Appellant subsequently appeared, and a special demurrer to the bill having been overruled, filed her answer.

The cause was in due course referred to the master. The report of the latter included in the amount found due an allowance for solicitor's fees. The amount so allowed was the sum expressly provided for in the trust deed to be paid out of the proceeds of sale in case of default in payment of the note thereby secured. In *Abbott v. Stone*, 172 Ill. 635-639, it is said: "The amount allowed for solicitors' fees was the amount agreed upon in the trust deed, and it does not appear to be unreasonable."

The trust deed also provides for all other expenses of the trust, including moneys advanced for insurance, taxes and other liens. The master, it is said, allowed \$17.50 for continuation of an abstract. The court had no power to allow the expense of obtaining an abstract in the absence of authority in the trust deed. *Cheltenham Imp. Co. v. Whitehead*, 123 Ill. 279-285. It does not appear, however, that appellant filed any objection or took any exception to this item of the master's report, and the error must be deemed waived. It is the duty of counsel to interpose objections, if they have any, so as to afford the master an opportunity to modify his report if it is wrong. If in such case the master, after hearing the objections, declines to change his report, it is the duty of the objecting parties, after it has been filed in court, to file exceptions there.

When this has not been done, and no sufficient reason assigned for not doing so, the report of the master when approved by the court will be deemed conclusive upon the questions covered by it. *Jewell v. Rock River Paper Co.*, 101 Ill. 57. Appellant is precluded from making the objection here. *Cheltenham Imp. Co. v. Whitehead*, 126 Ill. 279-285.

No question affecting the merits is suggested. It is not denied that the debt secured by the trust deed is justly due and payable. The decree appears to be substantially correct, and it must be affirmed.

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### Mary A. Railton v. The People et al.

1. FORMER DECISIONS—*Distinct Fines*.—Where two fines were imposed upon a party for contempt in the same proceedings, but not for the same act, and an appeal taken from each order imposing a fine, one of which appeals has been before and decided by the other division of this court (the records, briefs, argument, and questions of law being the same in both appeals), there is no reason why this court should do more than to refer to the opinion of that division and adopt it as the opinion of this court. (*Railton v. The People*, 83 Ill. App. 396.)

**Contempt Proceedings.**—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed November 7, 1899.

MOSES SOLOMON, attorney for appellant.

No appearance for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This is an appeal from an order entered June 1, 1898, imposing a fine upon appellant for contempt of court in interfering with the possession of certain property by a receiver of the court, and in interfering with such receiver

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in the collection of rents ordered by the court to be collected by him. Two fines were imposed upon appellant in this cause upon different dates for like, though not the same, contempt. A separate appeal was taken from each order imposing a fine. One of said appeals was before the other division of this court. The record is the same and the briefs and arguments are the same in the two appeals. No question of law is involved in one that is not involved in the other.

We have examined the opinion in that other case (83 Ill. App. 396), and fully concur in the conclusion there reached.

We therefore see no reason why we should do more than to refer to that opinion and adopt the same as the opinion of this court in the case at bar, which we do.

The order of the Superior Court is affirmed.

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**Sophia Mullan v. B. J. O'Shea.**

1. **DECREES**.—*Must be Supported by the Evidence.*—A decree on a creditor's bill must be supported by the evidence.

**Creditor's Bill.**—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed November 2, 1899.

**Statement.**—Appellee, a judgment creditor of Oscar E. Mullan, filed a creditor's bill, seeking thereby to reach certain personal property in possession of appellant. Sophia Mullan, the appellant, is the wife of Oscar E. Mullan, the judgment debtor. It is alleged in the bill of complaint that Oscar E., while indebted to appellee, conveyed to appellant the merchandise, fixtures, etc., contained in a store located on Archer and Hart avenues in the city of Chicago; that such conveyance was without consideration, and was not made in conformity with the requirements of the statute

governing transfers of personal property from husband to wife. The bill sought to subject this property to the satisfaction of the judgment. Appellant answered under oath that the property described was conveyed by Oscar E. Mullan to appellant for a valuable consideration and before said Oscar became indebted to appellee; admits that no bill of sale was ever executed by Oscar to convey the property; avers that appellant was a surety upon promissory notes made by Oscar to the amount of more than one thousand dollars; avers that the transfer of the property described was to secure appellant against loss by reason of her signing such notes as surety; avers that all the property so transferred by Oscar to appellant was sold by appellant and the proceeds applied in payment of said promissory notes; avers that the property now owned by appellant was purchased with her own individual funds; that no part of the property transferred by Oscar is now in possession of appellant, and that no proceeds of the disposition of such property was used in the purchase of the property now owned by appellant. The property now owned by appellant consists of the stock of goods, fixtures, etc., of a store on West Twenty-second street in Chicago, and it is averred in her answer (though not alleged in the bill of complaint) that a stock of goods, fixtures, etc., at this location also was transferred by Oscar E. Mullan to appellant, and for the same purpose, and was wholly disposed of in payment of the promissory notes executed by Oscar, and by appellant as surety. After replication, the cause was referred to a master in chancery to take evidence and report conclusions.

Upon the hearing before the master the following admissions were made by appellee:

"Complainant admits the witnesses for defendants will swear to the facts corroborative of every allegation in their answers, except the allegation of defendants that the transfer was made when Oscar E. Mullan was not indebted to complainant.

"Complainant also admits that Mrs. Mullan will testify that all the goods conveyed to her by her husband have

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been sold, and that not one of those articles of personal property is now in her possession."

And again, upon objection to certain testimony :

"By Mr. O'Shea: I object to that because it is among the admissions that have been made. I admit that the allegations in the answer are true."

"By the Master: All the allegations in the answer are admitted."

And again, upon further objections to testimony :

"Mr. O'Shea: I object to that because she has stated the history of it in her answer. I admit that the property has long since been sold; the stock of dry-goods has been sold by the witness; I admit that, and that none of said goods still remain in the possession of said Sophia Mullan."

"Mr. Wilcox: And that the fixtures are hers?"

"Mr. O'Shea: If she will say that, I will admit that it is so. Complainant admits that the stock of goods received from her husband was received by way of security for payments which Mrs. Mullan made to John V. Farwell for her husband, to pay her husband's debts."

There was no evidence whatever to the effect that any of the property now held by appellant, viz., the stock of goods, fixtures, etc., in the store now conducted by her, was purchased with proceeds of the goods previously transferred by Oscar E. Mullan to her.

The master found "that all the material allegations of the bill are sustained; that said transfer was invalid; that the business is still the business of Oscar E. Mullan; that complainant's judgment should be paid out of said goods in the hands of Sophia Mullan."

The court decreed in accordance with the findings and recommendations of the master. The decree is in part as follows:

"That V. Rolland O'Shea be confirmed as receiver of said goods at No. 751 West Twenty-second street, held by Sophia Mullan; that said receiver take sufficient of said goods to satisfy the above judgment and costs of the receivership and sell the same to the highest bidder."

From that decree this appeal is prosecuted.

L. P. WILCOX, attorney for appellant.

P. J. O'SHEA, attorney *pro se*.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

Both the bill of complaint and the decree proceed upon the theory that goods in the possession of appellant are equitably subject to the payment of the judgment against Oscar E. Mullan. The evidence does not sustain the allegations of the bill or the findings of the decree in this behalf. Moreover, the averments of the answer, made under oath, in response to the requirements of the bill, deny specifically all such allegations. And if there was any evidence tending to support these allegations of the bill, it is all rendered of no avail by the admissions of appellee. He admits, in effect, that the goods received by appellant from Oscar E. Mullan were entirely disposed of by appellant in the payment of the debts of Oscar. He also admits that no part of the property now sought to be reached by the decree and subjected to the payment of appellee's judgment was received from Oscar, the judgment debtor, or purchased with proceeds of property received from him.

It does not appear that the judgment debtor has any equitable interest whatever in the goods subjected by the decree to the payment of the judgment against him. Therefore, the decree is not supported by the evidence, but, on the contrary, is against the admitted facts.

There can be no question in this case as to the force of the statute regulating transfers of personal property from husband to wife. If it were sought to reach here the goods once transferred by Mullan to appellant, or to reach the proceeds, or property purchased with any proceeds of such goods, a different question would be presented.

The bill of complaint is not framed upon the theory that appellant purchased the goods now sought to be reached with any proceeds of goods which were transferred to her by the judgment debtor; and if it were so framed, the evidence and the admissions of appellee effectually dispose of that theory of relief.

The decree is reversed and the cause remanded.

**Standard Radiator Co. v. M. A. Fox and E. M. Clarkson.**

1. CONSTRUCTION OF STATUTES—*A Rule.*—It is a rule in the construction of statutes that one part is to be construed by another part of the same statute, and if any part of a statute is intricate, obscure or doubtful, the proper way to discover the intent is to consider the other parts of the act; for the words and meaning of one part of a statute frequently lead to the sense of another, and in the construction of one part of a statute every other part ought to be taken into consideration.

2. SAME—*Construction of Sec. 5 of the Mechanics' Lien Law of 1895.*—Section 5 of the "act to revise the law in relation to mechanics' liens" approved June 26, 1895 (Laws 1895, 226) must be construed with section 33 and other parts of the act, and so construing, the words, "nor to merchants and dealers in materials only," in section 5, apply only to contractors who are merchants and dealers in materials, and not to sub-contractors who are such merchants and dealers.

*Assumpsit*, for materials, etc. Appeal from the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded with directions. Opinion filed November 2, 1899.

J. V. A. WEAVER, attorney for appellant.

C. W. GREENFIELD, attorney for appellees.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellant, as a sub-contractor, sued Fox, the original contractor, and Clarkson, the owner, jointly, under Section 29 of the Mechanics' Lien Law, which authorizes such a suit under the circumstances mentioned in the section. The cause was first tried before a justice of the peace. On appeal to the Superior Court it was, by agreement of the parties, tried by the court without a jury. The court found for the defendants. Hence this appeal. The cause was tried on a stipulation of facts, by which it appears that appellant is a Missouri corporation, engaged exclusively in the manufacture of radiators and the sale of radiators of its own manufacture; that Fox contracted with Helen M.

Clarkson to furnish a steam-heating plant for a building owned by her, known as No. 4859 Michigan Avenue, in the city of Chicago, Illinois; that Fox, April 2, 1898, sent an order to appellant for radiators, with specifications of the same; that appellant filled the order and the radiators were delivered at Clarkson's building April 24, 1896, and were placed therein, and became a part of the steam-heating plant of the building; that the agreed price of the radiators was \$150.45; that no part of the price has been paid, and that, June 22, 1896, a notice was served on Clarkson, signed by appellant, of the furnishing of the radiators by appellant, by agreement with Fox, and that there was due to appellant therefor the sum of \$150.45. It was further stipulated that Clarkson, before the date of service of said notice, had paid to Fox all the money due to him on his contract, which money so paid was more than \$150.45; that Fox had never delivered nor tendered to Clarkson, nor had she ever demanded or received from him, a statement in writing under oath, or an affidavit, setting forth names of material-men or their proposals or contracts, or bids, or amounts for material to be furnished Fox to carry out and complete his contract with her, and that Clarkson did not demand nor receive from Fox any bond indemnifying her against the liens of material-men.

The only questions presented for decision are questions of law, namely: whether it is the duty of a contractor to give to the owner, and of the owner to require of the contractor, a statement in writing as specified in section 5 of the mechanic's lien law, of material to be furnished for the work which the contractor has contracted to do, when the party furnishing the material is a manufacturer and a dealer exclusively in articles of his own manufacture; and whether the notice of material furnished by appellant was served in apt time.

Section 5 of the law is as follows:

"Within ten days after the contract is made, and before commencing work thereunder, it shall be the duty of the contractor to give the owner, and also the duty of the owner



to require of him, a statement in writing, under oath or verified by affidavit, of the names and addresses of all parties having sub-contracts for specific portions of the work, or for material, and of the amount to become due each, and when, or if any such sub-contracts are not then let, the names and addresses of those who have made bids or proposals for the same or for material, and the respective amounts of such bids or proposals, and within ten days after the same are accepted, the amount thereof, and if any contractor shall fail to so notify the owner within five days after written notice to do so, such owner may cancel the contract with such contractor by written notice of such cancellation, and the lien of such contractor shall be subject to the liens of all other creditors. But this section shall not apply to contractors who have given, or within the ten days first named shall give, to the owner a good and sufficient bond for the completion of such building or improvement, free and clear of all mechanics' liens, and such bond is made for the use and benefit of those who may be entitled to such liens; nor where such persons shall in advance waive their rights to liens and bind themselves to perform their respective sub-contracts, services or labor; nor to contractors whose sub-contractors and material men agree to take solely for payment; nor to merchants and dealers in materials only." 2 S. & C.'s Stat., Ch. 82, paragraph 5.

Section 33 of the act is as follows:

"No payments to the contractor or to his order shall be regarded as rightfully made as against the sub-contractor, or party furnishing material, if made by the owner without exercising or enforcing the rights and powers conferred upon him in sections 5 and 23 of this act." *Ib.*, par. 33.

A person furnishing materials to the contractor is a sub-contractor. *Ib.*, par. 22.

Section 5 must be construed with section 33 and other parts of the act. So construing section 5 we think it clear that the words in section 5, "nor to merchants and dealers in materials only," apply to contractors who are merchants and dealers in materials only, and not to sub-contractors who are such merchants and dealers. It is a rule in the construction of statutes that one part is to be construed by another part of the same statute. Dwarris, after stating the rule, says:

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"If, therefore, any part of a statute be intricate, obscure, or doubtful, the proper way to discover the intent is to consider the other parts of the act; for the words and meaning of one part of a statute frequently lead to the sense of another, and in the construction of one part of a statute every other part ought to be taken into consideration." Potter's Dwarrris on Statutes, etc., p. 183.

The construction contended for by appellee—namely, that the statement provided for by section 5 is not required when the person furnishing materials is a merchant and dealer in materials only—would completely nullify section 33, which in terms includes all sub-contractors and persons furnishing materials, whereas the rule is that one part of a statute must be construed with another, so that the whole may, if possible, stand *ut res magis valeat quam pereat*. Potter's Dwarrris, 189.

In Huntley Mfg. Co. v. Mich. Cen. R. R. Co., 76 Ill. App. 387, we held that the exception in section 5 applies only to contractors who are merchants and dealers in materials only. In Andrews & Johnson Co. v. Atwood, 167 Ill. 249, the court, after quoting sections 23 and 33 of the act in question, say :

"Moreover, under the contract executed under the old law, Atwood, in making payments to the Fuller Company, in order to protect himself was only required to see that the sub-contractors of the Fuller Company had been paid, while under the new act, in order to protect himself, he was bound to see that all sub-contractors and material-men had been paid." *Ib.*, 253-4.

The radiators were delivered at the building of appellee Clarkson April 24, 1896, and appellant's notice was served on her June 22, 1896, within sixty days after such delivery. This is all the statute (section 25) requires; therefore the notice was served in apt time. The judgment will be reversed and the cause remanded, with directions to the trial court to enter judgment in favor of appellant and against appellees, for \$150.45, with interest at the rate of five per cent per annum from June 22, 1895, till the date of judgment. Reversed and remanded with directions.

**Richard P. Leahy v. Stanley Wojdak.**

1. **JUDGMENTS**—*In Joint and Several Demands*.—A judgment being a unit, if erroneous as to one of the joint defendants is erroneous as to all.

**Appeal from the Superior Court of Cook County; the Hon. SAMUEL C. STOUGH, Judge, presiding.** Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed November 2, 1899.

**MASTERTSON & HAFT**, attorneys for appellant.

No appearance by appellee.

**MR. JUSTICE ADAMS** delivered the opinion of the court.

This is an appeal from a judgment rendered on appeal from a justice of the peace in favor of appellee against appellant Leahy, George A. Williams and R. C. Huston, jointly. Leahy filed an affidavit denying joint liability. It appears from the evidence that Huston and Williams were conducting a store called "The Mart," and that Williams hired appellee to work in the store at a salary of \$50 per month, and that appellee worked in the store from April 15th to July 26th next, and that he only received for his work \$15, which was paid to him by Williams.

The evidence shows that Leahy had nothing to do with the business until about June 24th, when a corporation was formed, and an agreement was then made between those interested in the corporation, by which Frank M. Colby, for a consideration in the agreement mentioned, undertook and promised to pay all indebtedness created by "The Mart" prior to June 23, 1898.

There is, as before stated, no evidence whatever that Leahy had any interest in "The Mart" prior to June 24, 1898, or that any one except Williams and Huston were liable to appellee for work by him performed prior to that date.

Whether Leahy became personally liable to appellee for

work performed after June 22, 1896, when The Mart became incorporated, is, to say the least, doubtful. But it is not necessary to the decision of the case to decide that question. The judgment includes the amount due to appellee for services prior to June 20, 1898. It is, therefore, erroneous as to Leahy, and being a unit, if erroneous as to one of the joint defendants, it is erroneous as to all. The judgment will be reversed and the cause remanded.

Reversed and remanded.

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### Philip D. Armour et al. v. Henry F. Gold et al.

1. **VOLUNTARY ASSIGNMENTS—*Fraud in Procuring the Assent of a Majority of Creditors to a Petition for a Discontinuance.***—Any scheme or device by which the unadministered estate of an insolvent debtor is disposed of, in procuring the assent of a majority of his creditors to the discontinuance of the proceedings, is a direct violation of the statute and a fraud upon the minority creditors.

2. **SAME—*Construction of the Statute.***—The statute relating to voluntary assignments contemplates that all creditors of an insolvent debtor shall stand upon the same footing, and that the rights of all the creditors, as they existed at the time of the assignment are to be restored when the proceedings are discontinued, except in so far as the insolvent estate has been administered and disposed of by the County Court.

3. **SAME—*Power of the Court to Discontinue the Proceedings.***—The County Court has power to discontinue proceedings, under the act relating to voluntary assignments, upon the petition and assent of a majority in number and amount of the creditors petitioning for such discontinuance, provided there is no fraud connected with the procuring of such assent.

4. **SAME—*Effect of an Order of Discontinuance.***—By an order of discontinuance entered in the County Court, under this statute, an insolvent assignor is reinvested with the title and possession of his property as fully and to the same extent as before the assignment, and each creditor is in a position to establish his claim at law to the same extent as if no assignment had been made.

**Voluntary Assignments.**—Appeal from the County Court of Cook County; the Hon. JOHN H. BATTEN, Judge, presiding. Heard in this Court at the March term, 1899. Affirmed. Opinion filed November 2, 1899. Rehearing denied November 20, 1899.

**Statement by the Court.**—July 7, 1898, Gold & Brother, a copartnership composed of Henry F. Gold and Fred H. Gold, made a voluntary assignment of all their partnership property, except their real estate, for the benefit of their creditors. The assignment was filed in the County Court of Cook County on the same day, and said court proceeded with the administration of the insolvent estate until October 29, 1898, when the proceeding was discontinued upon the petition of the insolvent, the assignee having fully accounted and being discharged, and all the assets of the insolvent estate then in his hands were ordered turned over to the insolvents. From this order the appeal herein is taken.

The total receipts of the assignee during the course of the administration of the estate were \$5,614.82, and there was left in his hands, after deducting all his disbursements, including his fees and attorney's fees, at the time of the discontinuance, \$3,997.90, besides uncollected accounts due to said insolvents aggregating more than \$4,800, which the assignee reported he was unable to collect without suit, and that because the accounts were small he recommended that they be sold.

Sixty-five creditors filed claims within the time required by law, under notice in that regard given by the assignee, which aggregated \$8,453.13. Among these claims was that of appellants, which amounted to \$329.74, and was admitted to be correct.

October 26, 1898, the insolvents filed their petition for the discontinuance, from which and the order of the County Court thereon it appears that Gold & Brother, on October 14, 1898, sent a letter to all of their creditors, except to two named Schlacks and Whelpley, to whom they owed certain rents, but the amount owing was contested.

This letter, after stating that they desired a settlement with their creditors, the amount of claims filed, the amount in the hands of the assignee and the probable cost of administration, is as follows:

“We are of the opinion that if the estate now in the

hands of the assignee can be returned to us, we can so manage it that we can pay to our creditors fifty (50) per cent of their claims. It may be that we will require some assistance. That we have provided for. We therefore make this proposition: We will pay to our creditors, except our former lessors, fifty (50) per cent of their respective claims, provided that they will agree within seven days to accept that sum in full settlement, the same to be paid on or before October 31st, 1898. This offer is conditioned on the assignment proceedings being dismissed and the money and property returned to us.

"We herewith submit the assurance of Mr. R. J. Street, cashier of the First National Bank of Chicago, that security has been deposited with him that the above proposition will be performed."

Attached to this letter is a certificate by said Street that he held the sum of \$4,500, which was deposited with him by Charles A. Zahn as security for the faithful performance of the undertaking and conditions made by Gold & Brother to their creditors, as contained in said letter, and that if said insolvents should fail to pay as proposed in said letter to any creditor accepting the conditions therein stated, such creditor should have recourse against the money deposited with him. To this letter of insolvents and statement of Street, the consent in writing of said Zahn was attached, as was also an acceptance of the proposition contained in the letter, and a written consent that the assignment proceedings of the insolvents might be dismissed, the assignee discharged, and all assets of the estate returned to Gold & Brother, signed by the names of fifty-one creditors, whose claims aggregated \$6,253.28.

It appears from the evidence before the County Court, produced on the hearing of insolvents' petition, that they, the insolvents, proposed to pay all creditors consenting to the discontinuance fifty per cent in settlement of their claims out of the funds ordered to be turned over to them by the assignee; also that all the creditors of the insolvents (including appellants), except their landlord and another who could not be found, also a landlord, had an opportunity to accept fifty cents on the dollar of their claims, but it was

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explained to them that they could only be paid that amount in case they consented to the discontinuance, and that the payment was expected to be made out of the funds in the hands of the assignee. It further appears that the money deposited by Zahn with Street was not to be paid back to him by the assignee, but was to be returned to him by Street after Gold & Brother had paid their creditors who gave their consent to the discontinuance.

ALFRED R. URION and ABRAM B. STRATTON, attorneys for appellants.

CRATTY, JARVIS & CLEVELAND, attorneys for assignee.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellants contend that the "consents signed by the creditors were unlawfully procured; were not the voluntary acts of the signers thereof; were consequently void, and the order entered in pursuance thereof was unauthorized."

Sec. 15 (Ch. 11) of the act relating to voluntary assignments in this State is as follows:

"All proceedings under the act of which this is amendatory may be discontinued upon the assent, in writing, of such debtor, and a majority of his creditors, in number and amount; and in such case all parties shall be remitted to the same rights and duties, existing at the date of the assignment, except so far as such estate shall have already been administered and disposed of; and the court shall have power to make all needful orders to carry the foregoing provisions into effect." (Hurd's Stat. 1897, p. 174.)

The power of the County Court relating to the discontinuance of proceedings therein involving voluntary assignments has been several times considered by this court and also in the Supreme Court. The cases in this court need not be referred to, as we are of opinion that the Supreme Court decisions are such as to control the case at bar.

The following are the Supreme Court cases referred to: Howe v. Warren, 154 Ill. 227; Terhune v. Kean, 155

Id. 506; Am. Exch. Bk. v. Walker, 164 Id. 135; Stoddard v. Gilbert, 163 Id. 131; Kelley v. Leith, 176 Id. 311.

The first four of these cases announce the doctrine, in substance, that any scheme or device by which the unadministered estate of the debtor is disposed of in procuring the assent of a majority of creditors to the discontinuance of the assignment proceedings, is a direct violation of the spirit and letter of the statute and a fraud upon the minority creditors; also that the statute contemplates that all creditors of the estate shall stand upon the same footing, and that the rights of all the creditors, as they existed at the date of the assignment, are to be restored when the proceedings are discontinued, except in so far as the insolvent estate shall have already been administered and disposed of by the County Court.

In each of those four cases referred to, the property was not returned to the insolvents, and all the creditors were not remitted to the same rights and duties as existed at the date of the assignment, except in so far as the estate had been previously administered; but the remaining insolvent estate, in each case, immediately, on the discontinuance of the assignment proceedings, was given over to some third party or to a trustee, under an arrangement which deprived certain creditors of their legal right to resort to it for the payment of their claims. It was not returned, and the title and possession thereof reinvested in the insolvents.

In the Kelley case, *supra*, the Supreme Court review all the above cases, except the Stoddard case, distinguish them from the one then under consideration, and say: "In the absence of fraud connected with the procurement of the assent of a majority, in number and amount, of creditors petitioning for such discontinuance, the above statute fully authorizes a County Court to discontinue such assignment proceedings, upon compliance with its provisions.

"In this case the original debtors, by an order of discontinuance entered by the County Court of Cook County, were reinvested with the title and possession of all of their



## Iroquois Furnace Co. v. Kimbark.

property as fully and to the same extent as before the assignment. Appellant, under the order of the court, was then in a position to establish his claim at law, if one existed, and to proceed against the property of the debtors as fully and to the same extent as though an assignment had not been made or an order of discontinuance entered."

We are of opinion that the Kelley case and the one at bar are identical in principle. Here, as in that case, there was no fraud; every creditor, except the ones whose claims were disputed, had an opportunity to get the same amount on their claims as did the consenting creditors; except that in the Kelley case the creditors were to be paid in full instead of fifty per cent, as in the case at bar. There was no concealment in this case. The assets of the estate were kept intact and ordered turned over to the insolvents by the order of discontinuance, and they were reinvested with the title and possession of all their property, not exhausted in the previous administration, to the same extent as before the assignment. That is all that the statute requires. Appellants were at full liberty to pursue the estate so turned over to the insolvents to the same extent as before the assignment.

The fact that the assignors expected to pay the promised fifty per cent of their claims to the consenting creditors when they received back their property from the assignee, does not, in our opinion, invalidate the discontinuing order.

No part of the insolvent estate was appropriated to the payment of the consenting creditors, nor were they given any lien upon it, and appellants were deprived of none of their legal rights.

The order of the County Court is therefore affirmed.

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**Iroquois Furnace Co. v. Seneca D. Kimbark et al.**

1. *APPEALS—From Interlocutory Orders.*—In appealing from an interlocutory order appointing a receiver no order of the court allowing an appeal is necessary, under the provisions of the statutes.

2. *NOTICE—Of Application for the Appointment of a Receiver—*

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*Harmless Error.*—Under the circumstances of this case notice should have been given of the application for the appointment of a receiver. but as the appellant has suffered no prejudice by reason of the lack of such notice the error is without prejudice and insufficient to reverse.

3. *RECEIVER—A Party to the Suit Not Necessarily Incompetent.*—Where the only relation of a person to the subject-matter of the litigation arises from the fact that he was previously appointed agent, by the voluntary act of all the parties, to take charge of and manage the property involved, and for that reason made a party to the suit, does not render him an improper person to be appointed receiver.

4. *SAME—Parties to Suits Incompetent.*—There are decisions in this State, and authorities elsewhere, that in some instances, and notably in receiverships of copartnership property, an interested party may, with propriety, be appointed receiver.

5. *SAME—Parties in Interest.*—Where the parties interested in the property have, before the litigation arose, voluntarily agreed upon a person to act as agent for them all, *it has been held* that upon litigation arising between such parties as to such property, the person so acting as agent is a fit and proper person for appointment of receiver.

6. *SAME—A General Rule.*—The order appointing a receiver is largely discretionary with the court, especially so in respect to the fitness of the person appointed, and such an order will not be disturbed upon review, upon the ground that the person appointed is an unfit person unless some objection appears which is overwhelming in propriety or fatal upon principle.

**Interlocutory Order Appointing a Receiver.**—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed November 2, 1899.

**Statement.**—This is an appeal from an interlocutory order appointing a receiver for property owned jointly by appellant and certain of appellees. Appellant and appellees Kimbark and the Parkhurst & Wilkinson Co. were judgment creditors of the Chicago Skein & Axle Co., and in January, 1896, purchased the personal property constituting the plant of said Skein & Axle Co. at sheriff's sale under execution. Parkhurst & Wilkinson also filed a creditor's bill to reach certain choses in action due the Skein & Axle Co. It was thereupon agreed by all of said parties that the proceeds of said executions and results realized from said creditor's bill should be shared by the parties in proportion to their respective claims, which claims aggregated about \$25,000, of which appellant held about one-fourth and appellees

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about three-fourths. The personal property having been bought in under the executions, the parties entered into a contract dated January 30, 1896, whereby it was provided that Walter B. Mitchell should be appointed agent to take possession of said personal property and receive all fruits of such creditor's bill, and to operate the plant (theretofore operated by the Skein & Axle Co.) for the joint benefit of the parties to said agreement, with power to buy material for the manufacture of the product of such plant, to solicit orders for the sale of goods, to lease the premises from month to month and incur such other expense as might be necessary, and with direction to make statement of the expenses, disbursements and receipts as often as desired by the parties.

By this agreement it was provided that any of the parties in interest should have the right, upon giving notice to the others, to stop the operation of the plant, and it was also provided that whenever a sum equal to five per cent of the total amount of the judgments held by said parties should accumulate in the hands of the agent over and above expenses the same should be distributed to the parties in proportion to their respective interests.

Under this contract Mitchell operated the plant from January, 1896, until July, 1899.

In May, 1899, the appellant served notice on the other parties to the contract and on Mitchell, the agent, that it desired the business to be stopped and the property disposed of within sixty days. On July 15, 1899, and within the sixty days mentioned in said notice, appellees filed their bill of complaint, alleging that in the personal property in question there was a large number of patterns for thimble skeins accumulated during a long course of business; that such patterns enabled the manufacturer to control the business of the leading wagon manufacturers of the Northwest; that such patterns were worth many thousands of dollars, and that the business could not be secured by any one not in possession of such patterns; that it was largely to realize the value of the patterns that the above mentioned agree-

ment had been entered into; that the good will of the business was of great value and could only be realized by selling the same as a going concern; that Mitchell conducted the business as agent from the time of said contract until the filing of the bill; that the business had been so successful that he was never obliged to call on the parties for capital to carry on the same; that he had built up a large and profitable business and accumulated thousands of dollars' worth of additional patterns; that the business, patterns, property and good will, if sold as a going concern, would pay the amounts due the parties in interest; that large and valuable contracts were on hand, the performance of which would extend over several months; that there were large profits in such contracts, and that if the same were not completed the principals for whom said Mitchell acted would be liable for damages.

The bill further charged that the Iroquois Furnace Co. had ceased to do business; that Foster, its active manager, was about to start in the foundry business in competition with the trade carried on by said Mitchell as agent, and was desirous of stopping said business, and that with that end in view he sought, in the name of the Iroquois Furnace Co., to wipe out the business here in question and depreciate the value of its assets and acquire the property, patterns and good will for little or nothing.

That Mitchell, as agent, had no power to carry on the business after July 17th, but that complainants were entitled to have the same thereafter carried on through a receiver in order to realize their just share of the assets, patterns and good will.

That complainants were entitled to an accounting from Mitchell, as agent, and from the other parties to the contract, for the purpose of ascertaining what moneys were due them under said contract and from the operation of said business thereunder.

On the same day the bill was filed, the defendants, composing the firm of Parkhurst & Wilkinson, which had been merged into the corporation known as the Parkhurst &

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Wilkinson Co., entered an appearance and filed a written consent to the appointment of Walter B. Mitchell as receiver. On the same day, and without notice to appellant, an order was entered appointing Mitchell receiver of the property in question, to carry on the business and "to keep the business together as a going concern for not exceeding thirty days, and to prepare the property and business for sale; to get it in shape to advertise and sell as a going concern," etc.

From the certificate of evidence it appears that the bill was presented to the judge, who entered the order on July 15th by the solicitor for the complainants, with the request that an order be entered appointing a receiver; that the solicitor stated to the court that all the defendants had been served or had entered an appearance, but that no notice of the motion for the appointment of a receiver had been given to appellant; that the defendants other than appellant desired the appointment of Mitchell as receiver; and thereupon the court entered the order of July 15th, appointing him as such and designating his powers and authority.

On July 19th the Iroquois Furnace Co., by its solicitors, after due notice to the complainants, moved the court to vacate or modify said order, remove said Mitchell as receiver, and substitute some other person in his place and stead. At the hearing of said motion it was conceded by appellant that a receiver was necessary for the sale of the assets mentioned, but it was objected that said order as entered was improper, because there had been no notice to appellant, because the powers vested in the receiver were too broad, and because appellant should have been permitted to participate in the hearing upon which the receiver was appointed, to make its suggestions and objections respecting the person so to be appointed, and respecting the provisions of the order and the powers vested in the receiver. At the hearing of this motion an affidavit of Charles F. Foster, secretary and general manager of appellant, was read.

The court refused to remove said receiver or substitute

some other person in his place and stead, or to modify the order complained of. Thereupon appellant prosecuted this appeal from the order appointing the receiver.

DEFREES, BRACE & RITTER, attorneys for appellant.

HAMLIN, SCOTT & LORD, attorneys for S. D. Kimbark and Parkhurst & Wilkinson Co., appellees.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

Appellee has presented a motion to dismiss this appeal because no appeal was prayed and allowed in the court below. The motion is denied. The order appealed from being an interlocutory order, no order of the court allowing an appeal is made necessary by the provisions of the statute. *Commerce Vault v. Hurd*, 73 Ill. App. 107; *Hartzell v. Warren*, 77 Ill. App. 274; *Eichenbaum v. The Eichenbaum Co.*, 78 Ill. App. 610.

The several grounds upon which appellant seeks a reversal of this order are: 1st. That the application for the order was *ex parte* so far as appellant is concerned, and that the order was entered without any notice to appellant. 2d. That Mitchell, who was appointed receiver by the order, was an improper person to be so appointed because of his relationship to the subject-matter of the litigation. 3d. That the order is too broad.

We are of opinion that under the circumstances of this case, notice might and should have been given to appellant of the application for the order. But it is conclusively shown by the record that appellant has suffered no prejudice by reason of lack of such notice; for upon a full hearing, participated in by appellant, the court afterward denied a motion to vacate the order of appointment. The order should not, therefore, be reversed, and the court below put merely to the re-entering of an order upon notice which that court has already determined to be proper upon a full hearing. The error complained of is an error

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\* shown to have been without prejudice, and to reverse upon that ground alone would be to require needless proceedings in the trial court. *O'Kane v. W. E. D. G. Co.*, 72 Ill. App. 297; *N. Y. Bank Note Co. v. Kerr*, 77 Ill. App. 53; *Cook Co. B. Co. v. Kaehler*, 83 Ill. App. 448.

The second contention is that Mitchell's relation to the subject-matter of the litigation made him an unfit person to be appointed receiver. It is conceded by appellee, and was, upon the hearing to vacate this order, that the appointment of a receiver was necessary, and the only objection to the order then or now is because of the person appointed. Counsel for appellee contend that because of this concession appellant can not question the propriety of the order. To this we do not assent. The propriety of the original order of appointment may be questioned upon appeal as well because of the person appointed as upon any other ground. The effect of the decision in *International L. & I. Union v. McGonigle*, 72 Ill. App. 399, is to hold that where there is no appeal from an interlocutory order appointing a receiver, the propriety of the receivership can not be questioned by an appeal from a subsequent interlocutory order which merely substitutes one person for another as receiver. Where an order is final and appealable, or in an interlocutory order made appealable by the statute, the propriety of the appointment of any person, by reason of his relation to the suit, may be questioned upon review. This appeal is from the original order of appointment. We have, then, to determine if Mitchell is an unfit person to be so appointed. The only relation of Mitchell to the subject-matter of the litigation arises from the fact that he had been previously appointed agent, by the voluntary act of all the parties, to have charge of and manage the property here involved. Therefore he was made a party to the suit. There are authorities to the effect that in general a party to the suit should not be appointed receiver therein. *High on Rec.* (3d Ed.) 70; *Benneson v. Bill*, 62 Ill. 408; *Finance Co. v. C. R. R. Co.*, 45 Fed. Rep. 436.

But there are as well decisions in this State, and authorities elsewhere, that in some instances, and notably in

receiverships of copartnership property, an interested party may with propriety be appointed as receiver. High on Rec. 67; Beach on Rec., Sec. 27; Miller v. Jones, 39 Ill. 54; The People ex rel. v. The Ill. Building & Loan Ass'n, 56 Ill. App. 642; Robinson v. Taylor, 42 Fed. Rep. 803. And where, as here, the parties interested in the property have previously and before the litigation arose, voluntarily agreed upon a person to act as agent for them all, it has been held that upon litigation arising between such parties as to such property, the person who had been so acting as agent was a fit and proper person for appointment as receiver. Hanover Fire Ins. Co. v. Germania F. I. Co., 33 Hun, 539.

We regard this decision as being strongly in point. The facts are very like to the facts of the case under consideration. Two insurance companies had established a joint agency and had agreed that upon the termination the agent so appointed should close up the affairs of the joint agency. One of the parties to the agreement undertook to prevent the agent from closing up the business. Upon a bill filed by the other party to the agreement the court appointed the agent as receiver of the joint property. The court, in reviewing the propriety of such appointment, said:

"As the parties themselves had agreed that the defendant Stoddard should manage and close the affairs of this agency, it was entirely regular, so long as he had been interfered with on the part of one of them, that he should be appointed managing receiver by the court and placed under its special control and protection. This was no more than carrying into effect the agreement the parties themselves had voluntarily made; and it was alike beneficial to both of them that this appointment should take place."

A well established rule, applicable to such questions as here presented, is that the order appointing a receiver is largely discretionary, (and especially so in respect to the fitness of the person appointed), and that such order will not, in that behalf, be disturbed upon review unless some objection appear which is overwhelming in point of propriety or fatal upon principle. High on Rec. 65; Cookes



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v. Cookes, 2 De G. J. and S., star page, 526; Shannon v. Hawks, 88 Va. 338.

We are not prepared to say, from all that appears by the record, that the appointment of Mitchell as receiver was so opposed to principle as to warrant us in reversing the order. We are, on the contrary, led to believe from the record that the appointment of any one other than Mitchell would have greatly impaired the selling value of the plant, and hence have been detrimental to the interests of all the parties. The grounds of objection to this appointment seem slight in comparison with the ground of objection to appointing any one else, and thereby changing the assets from the plant of a going and profit-earning concern into assets which would consist of machinery, material and merchandise only.

Nor do we regard the order as too broad. By it the receiver is given no power to allow and pay claims of creditors except as approved and ordered by the court. The order does not reach any property except such as belongs to the joint ownership. The order is affirmed.

Pioneer Cooperage Co. v. Anton Romanowicz.

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1. **MASTER AND SERVANT—*Notice of Defective Machinery.***—The master is not to be held liable for defects and dangers of which the servant is fully informed, but the servant is authorized to rely upon the acts of the master in this respect, and is under no primary obligation to investigate the fitness and safety of the machinery, in the absence of notice that there is something wrong in it.

2. **SAME—*Actual Notice Not Necessary.***—Actual notice of a defect is not necessary, it being sufficient that the master might have been informed by the use of such diligence as the law imposes upon him; but when he did not know and could not have informed himself of the defect he can not be held responsible.

3. **SAME—*Efforts to Put Machinery in Order, When Futile.***—It is not enough when a machine is dangerously defective, and known to be so, to make a futile effort to put it in order and then leave it to itself.

**Action in Case,** for personal injuries. Appeal from the Circuit Court of Cook County; the HON. RICHARD S. TUTHILL, Judge, presiding.

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Pioneer Cooperage Co. v. Romanowicz.

Heard in the Branch Appellate Court at the October term, 1899. Affirmed. Opinion filed November 7, 1899.

**Statement.**—This is a suit to recover for personal injuries, inflicted by a machine used for pressing barrel staves together and putting on the hoops. The declaration charges that appellant negligently suffered the machine to be and remain out of order; that appellant knew, or ought to have known, its dangerous condition; that appellee was in the employ of the appellant and was set at work with the machine without information or knowledge of the defect, and was, while operating it without fault on his part, seriously injured, having his left hand crushed, and that the injury was owing to such dangerous and defective condition.

JOHN A. POST and JOHN B. BRADY, attorneys for appellant.

GEORGE W. SHINN, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

At the conclusion of the case, the appellant herein presented a written motion requesting the court to exclude the evidence, and instruct the jury to find the defendant not guilty. The motion was denied. Appellant put in no proof, and the jury returned a verdict in favor of the appellee.

It is contended by appellant that there is no evidence showing or tending to show that the machine was in a defective condition at the time of the accident, nor that its alleged defective condition had existed for such a length of time that the master could be presumed to have had notice of any defect; nor that the master did know of any defect.

One of appellee's witnesses states that prior to the accident he had worked about six years on the machine by which appellee was injured; that it was set in operation by a foot pedal; that when the operator placed his foot on the pedal then the machine was set in operation, and the press descended upon the barrel on which the pressure

was to be exerted; that when the foot was removed from the pedal the machine was "supposed to stop," but that when he was working with it it sometimes failed to do so, because the spring was too loose. It is claimed that by reason of this defect the machine descended unexpectedly when it should not have done so, and without being started, and thus caught the appellee's hand, inflicting the injury. The witness testified that he talked several times with the foreman about this defect in the machine; that the last time was about a year before he quit working there; that the foreman fixed it then, and he never spoke to the foreman about it afterward although "sometimes it come down but I don't say anything." He says that it was repaired several times, and about two or three months before the accident, but it would nevertheless work the same as before; that sometimes a barrel could not be gotten out of the machine by getting hold of it at the side, and it was necessary to get hold of the barrel at the top, where the appellee's hand was at the time of the injury.

It appears from the evidence that notwithstanding the alleged defect one who understood the liability to irregular action of this particular machine could operate it without serious danger of injury. Appellee states that he had been working for appellant handling barrels about two months before the accident, and did not do any other work; that when he was put to work on this machine it was the first time he had worked with that kind of a press; that he worked with it a day and a half before the accident, and that when set to work the foreman said nothing, but pointed to the machine, left him there and went away. He says he does not know how the accident happened; that he was told afterward his hand was on top of the barrel, but he had become unconscious. Appellee was asked if he had his foot on the treadle at the time he was hurt, and replied that he does not know where his foot was at the time. Later, however, on cross-examination, he says that as long as he was conscious his "feet were in front of the machine where they ought to be, where I always had them." He states

that the machine had, while he was handling it, worked all right up to the time of the accident; that the barrel was tight in the press and he had to jerk it to get it out, which he was trying to do when he was injured.

The substance of this evidence is to the effect that the machine had been out of order a long time; that the attention of the foreman had been called to its condition and unsuccessful efforts had been made to repair it; that the defect and consequent danger to one using it had not been pointed out to the appellee, who had not been previously working with such machine, and he was given no warning or information of the liability of the press to descend at times without pressure upon the pedal; that therefore the danger of placing his hand on the top of the barrel was unknown to him; that his feet were not on the pedal at the time the press descended and caught his hand, inflicting the injury, and that therefore its descent was another exhibition of the irregular action caused by its defective condition.

There was no testimony introduced tending to controvert these propositions, and the jury found in favor of appellee.

Appellant's counsel urge "first, that there is no evidence showing or tending to show that the machine was in a defective condition at the time of the accident, or that its alleged defective condition had existed for such a length of time that the master was presumed to have had notice of the same, or that the master did know of any defect."

In view of what, as we have pointed out, the evidence tends to show, we can not agree with this contention. There clearly is evidence that the machine was defective at the time of the accident, that the press descended without pressure upon the pedal, that the defect had existed for several years, and that the master had several times ineffectually undertaken to repair it, and therefore must have had knowledge that such a defect had existed. It is true that the evidence does not show notice to the master, or the foreman, that the last effort to repair it had been unsuccessful. But having notice of the defect, an ineffectual effort to repair, with no evidence of any effort to make sure

that the defect had been effectually corrected, would not relieve the master of the charge of negligence. It is not enough when a machine is dangerously defective and known to be so, to make a futile effort to put it in order and leave it to itself. The evidence tending to show that it had been frequently out of order in the same way before, we can not say the jury were not justified in concluding that the master knew, or in the use of ordinary care and diligence should have known, that it was defective at the time the appellant was set to work upon it without information or knowledge of the defect. In the case of *Sack v. Dolese*, 137 Ill. 129, which is cited in appellant's brief, it is said :

"If plaintiff had shown that the fault in the brake was in fact known to appellee's foreman, or car inspector, but unknown to himself, he would have made out his case; and so, too, would he have made his case had he shown that the defect was of such a nature that it would have been known to them if they exercised due care. No defect is latent which an inspection will disclose."

In the case before us, the foreman's attention having been called to the defect, and an effort to repair having been made, it was his duty as representing the master to endeavor to ascertain whether the defect still existed, before he put a man at work with the machine without informing him of the danger, or showing him how to avoid it.

In *Chicago & Eastern Ill. R. R. Co. v. Hines*, 132 Ill., p. 169, the court says that "while the master is not to be held liable for defects and dangers of which the servant is fully informed, yet the servant is authorized to rely upon the acts of the master in that respect, and is under no primary obligation to investigate the fitness and safety of the machinery, surroundings, etc., in the absence of notice that there is something wrong in that respect." In *Chicago & Alton R. R. Co. v. Platt*, 89 Ill., 141, it is said:

"Actual notice of the defect is not necessary, it being sufficient that the company might have been informed by the use of such diligence as the law imposes upon it; but when it did not know and could not have informed

itself of the defect the company can not be held responsible."

It is urged that the trial court erred in allowing a witness to state in answer to a question by counsel as to how the accident happened, that the appellee "did not understand the work nor the machine, that is why he was hurt." It is said the declaration did not allege any unfamiliarity with the work, nor improper instructions, and that this answer prejudiced the mind of the jury. The declaration charges a defect in the machine, and that without fault or negligence in the appellee, without knowledge on his part of the danger, and without having at any time or in any manner been adequately apprised of it, the injury was inflicted.

It is, we think, manifest that the language of the witness in reference to the appellee not understanding the work, had reference to the working of the machine in its alleged defective condition; that he had no knowledge of the danger, and how to avoid it; and the declaration charges, not improper instructions, but no instructions at all.

Complaint is made of the refusal of certain instructions requested by appellant. These related to an alleged release or receipt signed by the appellee. It is said that "these instructions, or some of them, should have been given to the jury." It is not pointed out wherein the court erred in refusing them or any of them. We do not regard their refusal as error, in view of the evidence.

For the reasons indicated, the judgment of the Circuit Court must be affirmed.

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### William Lumley v. Kinsella Glass Co.

1. PROMISSORY NOTES—*Signatures of Makers, When Descriptions Personarum.*—In an action on a promissory note signed as follows—"U. S. Desk Manufacturing Co., Wm. Lumley, Sec'y," it is proper to instruct the jury that the presumption of law is that the note is the note both of the U. S. Desk Manufacturing Company and of Wm. Lumley, and that

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unless such presumption is overcome by the evidence, the verdict must be in favor of the plaintiff and against both of the defendants in this case.

2. SIGNATURES—*Descriptio Personae*.—In this State the rule is that adding to the signature "Sec'y," is to be regarded as *descriptio personae* merely.

**Assumpsit**, on a promissory note. Error to the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1899. Affirmed. Opinion filed November 7, 1899.

SMITH, HELMER, MOULTON & PRICE, attorneys for plaintiff in error.

The instruction given for plaintiff below, that *prima facie* the notes offered in evidence were the personal obligations of both defendants, was error. Daniel on Negotiable Instruments, Secs. 300, 398, 400; Castle v. Belfast Foundry Co., 13 Cent. Law Journal, 373 (Me. 1881); Draper v. Mass. Steam Heating Co., 5 Allen 338; Abbot v. Shawmut Mut. F. Ins. Co., 3 Allen, 213; Atkins v. Brown, 59 Me. 90; Bradlee v. Boston Glass Co., 16 Pick. 347; Mann v. Chandler, 9 Mass. 335; Mott v. Hicks, 1 Cowen, 532; Latham v. Houston Flour Mills Co., 3 S. W. Rep. 462; Means v. Swormstedt, 32 Ind. 87; Hancock v. Yunker, 83 Ill. 208.

The form "We promise" is the proper and only proper form for a corporation note and this note did not indicate a joint liability. Burlingame v. Brewster, 79 Ill. 515; Newmarket Savgs. Bank v. Gillet, 100 Ill. 262; Scanlan v. Keith, 102 Ill. 645.

WICKET & BRUCE, attorneys for defendant in error.

The instruction, given, that the notes were *prima facie* the notes of both defendants, was correct. McNeil v. Shober & Carqueville Lith. Co., 144 Ill. 238; Powers v. Briggs 79 Ill. 493; Williams v. Miami Powder Co., 36 Ill. App. 107; Tama Water Co. v. Randall, 52 N. W. R. 208; Casco Natl. Bk. v. Clarke, 18 N. Y. 887; Heffner v. Brownell, 31 N. W. Rep. 947 (70 Iowa 591); Heffner v. Brownell, 39 N. W. Rep. 640; McCandless v. Belles

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Plains Canning Co., 78 Iowa, 163; Stobie v. Dills, 62 Ill. 432; Village of Cahoka v. Rautenberg, 88 Ill. 219.

The notes were conclusively the notes of William Lumley and the United States Desk Manufacturing Company. Heffner v. Brownell, 70 Iowa, 591; Heffner v. Brownell, 39 N. W. Rep. 644; McCandless v. Belles Plains Canning Co., 78 Iowa, 163; Fiske v. Eldridge, 12 Gray, 474; Tama Water Power Co. v. Randall, 52 N. W. Rep. 208.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This suit was brought against the U. S. Desk Mfg. Co. and the plaintiff in error. Verdict and judgment were against both. The plaintiff in error—Lumley, alone brings the case to this court. The question in the case is as to the individual liability of plaintiff in error upon two promissory notes. One of them is as follows, viz:

"\$200.

October, 11, 1895.

"Sixty days after date we promise to pay to the order of The Kinsella Glass Co. two hundred dollars, at 882 Elk Grove avenue, Chicago. Value received, with interest at six per cent. per annum.

U. S. DESK MANUFACTURING CO.

WM. LUMLEY, Sec'y."

The other note is the same as the above except as to the amount, and the time of payment.

At the trial the court, at the instance of defendant in error, gave to the jury the following instruction, viz:

"The jury are instructed that the presumption of law is that the notes in evidence are the notes both of the U. S. Desk Manufacturing Company and of William Lumley, and that unless such presumption is overcome by the evidence their verdict must be in favor of the plaintiff, and against both of the two defendants in this case."

Counsel for plaintiff in error say that they rely for a reversal of the judgment of the Circuit Court upon the following "salient points stated \* \* \* in the order of their importance," viz:

"First. The instruction given for the plaintiff below entirely misstated the law, and was radical error.



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Second. The suit was brought upon an alleged obligation of joint liability. No joint liability was shown by the evidence and a judgment against both defendants was wrong.

Third. The whole evidence in the case failed to show any undertaking by the defendant Lumley."

There was no error in the giving of this instruction. It states to the jury, as it is very fairly and concisely stated by counsel for plaintiff in error, that "*prima facie* the notes offered in evidence were the personal obligations of both defendants."

The rule is not uniform in the different States upon this question. In this State the rule is that adding to the signature "Sec'y" is to be regarded as *descriptio personae* merely. *Williams v. Miami Powder Co.*, 36 Ill. App. 107, 114.

Upon the trial, parties were permitted to present testimony upon the question of whether it was the intention, at the time the notes were given, to make them as notes of the corporation only, and not to thereby create personal liability. There was a sharp conflict in the testimony upon this point. The finding of the jury is conclusive upon this court as to that question. In submitting the case to the jury the trial court held correctly that *prima facie* the notes offered in evidence were the notes of both the defendants. *McNeil v. Shober & Carqueville Lith. Co.*, 144 Ill. 238.

The instruction further states to the jury that unless the presumption—the *prima facie* case—is overcome by the evidence the verdict should be against both the defendants. The jury must have found that the evidence did not overcome the presumption and that it was the intention of the parties to create a personal liability. That finding is conclusive upon this court, under the facts and circumstances as they appear in the record in this case.

The judgment of the Circuit Court is affirmed.

**Giacomo Allegretti, B. F. Rubel and I. A. Rubel v. The Allegretti Chocolate Cream Co.**

1. **INJUNCTIONS—Pending Appeals.**—Where an appeal was taken from a restraining order of the trial court to the Appellate Court, and the order fixing the amount of the appeal bond provides that the restraining decree be stayed “*during the pendency of this appeal*,” if the decree is affirmed in the Appellate Court, and an appeal is taken to the Supreme Court, the staying order is not in force pending the appeal to the Supreme Court.

**Contempt Proceedings.**—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1899. Affirmed. Opinion filed November 7, 1899.

MORAN, KRAUS & MAYER and CLYDE E. MARSH, attorneys for appellants.

DARROW, THOMAS & THOMPSON and DOUGLAS C. GREGG, attorneys for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This is an appeal from an order of the Superior Court adjudging appellants to be in contempt of that court and imposing a fine. The decree in question was rendered upon a bill filed by the appellee against the appellants, whereby the appellee sought to restrain appellants from certain modes of manufacturing and selling chocolate creams, and from using the name “Allegretti.”

Appellants prayed an appeal to this court upon the entry of said decree, which was allowed. Subsequently the following order was entered by the Superior Court, viz:

“This cause coming on to be heard, on motion of defendants for an order fixing the amount of the appeal bond in the above suit, and the court having heard arguments of counsel, fixes the amount of the appeal bond at \$5,000, and further orders that the decree heretofore entered in this

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cause be stayed *during the pendency of this appeal*, upon the filing and approval of said bond."

Said decree was affirmed by this court May 31, 1898 (76 Ill. App. 581). Thereupon an appeal was prayed and allowed from this court to the Supreme Court. By the latter court the judgment of this court affirming the decree of the Superior Court was affirmed December 21, 1898 (177 Ill. 129). No order was entered in this court staying said decree during the pendency of the appeal to the Supreme Court. While the appeal from this court to the Supreme Court was pending and undetermined, viz., July 23, 1898, the petition in the case at bar was filed in the Superior Court, praying in substance that appellants be held to be in contempt and dealt with accordingly. To that petition appellants filed their answer, denying that they were in contempt, and the Superior Court proceeded to hear testimony and determine the issue thus presented.

In its final order upon said petition, the Superior Court found from the evidence that the allegations of said petition, as to the violation by appellants of the restraining provisions of said decree, were true, and that the matters of excuse, explanation and avoidance set up in the answer of appellants to said petition are insufficient, evasive, and in so far as appellants thereby deny the allegations of said petition, the said answer is untrue.

Thereupon the Superior Court ordered and adjudged that appellants were guilty of contempt of that court in willfully neglecting and refusing to comply with said decree, and that they be each fined in the sum of \$100. It is from that order that this appeal is prosecuted.

On behalf of appellants two points are presented for the consideration of this court, which may be stated thus:

*First.* The decree is *mandatory* only and not *prohibitive*, and for that reason the appeal stayed the restraining order in the decree.

*Second.* That the order of the Superior Court fixing the amount of the bond provided that the decree "be stayed during the pendency of this appeal," and that operated as

such a stay pending the appeal from this court to the Supreme Court.

First. In our view of the facts it is unnecessary to consider the legal question as to the effect of an appeal from a *mandatory* injunction. The decree provides:

"That said defendants, B. F. Rubel, I. A. Rubel and Giacomo Allegretti, and each of them, their agents, servants, attorneys, representatives or assigns, be perpetually enjoined and restrained from using the name 'Allegretti' or 'Allegretti & Co.' in the sale of chocolate creams and confectionery in the county of Cook aforesaid, except when such use is coupled with words clearly indicating that such goods were manufactured and are sold by B. F. Rubel, I. A. Rubel and Giacomo Allegretti, and not by Ignazio Allegretti or the Allegretti Chocolate Cream Company."

As stated in their printed argument filed in this case:

"The position taken by counsel for appellant is, that the decree of June 1, 1897, is a *mandatory* and not a *prohibitive* decree, as it in effect compels appellants to perform certain acts to comply with that decree, by way of changing signs and labels, which would entirely revolutionize their methods of doing business and would entail the loss of a large sum of money."

That position is untenable. Whether it be correct as to the signs which read "Allegretti & Co.," and which remained upon the store of appellants after the decree was entered, in the same condition they were before, is not necessary to decide. The uncontradicted testimony shows that after said judgment by this court, and before the filing of said petition in the Superior Court, appellants sold chocolate creams in violation of said restraining decree. That is, they did precisely what the decree sought to prohibit. There is no provision in the decree authorizing appellants to use their sales labels, wrappers, etc., then on hand. The original decree was entered and sustained by the reviewing courts upon the theory and for the reason that appellants were guilty of fraud upon appellant and upon its rights. The labels, etc., referred to, were procured by appellants for use in consummating such fraud.

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They now claim that they should be permitted to use such labels; that is, continue the fraudulent acts which had been restrained, because to cease doing so "would entirely revolutionize their methods of doing business and would entail the loss of a large sum of money."

Again, it is said in appellant's printed argument, and in support of the contention that the injunction is only mandatory, that "It is therefore obvious that appellants were by the effect of this decree, in order to comply therewith, compelled to take various affirmative steps in altering their signs, labels, boxes, etc., by adding thereto as suggested by the decree."

That does not follow. Appellants are not required by the decree to continue in that business. All they are required to do is to cease their efforts to appropriate to themselves the fruits of the labors of those interested in the success of the business of appellee. That is the scope and purpose of the restraining decree, and that is but simply justice.

Second. Said original decree was entered June 1, 1897. An appeal to this court was prayed by appellants and allowed. Subsequently, June 8, 1897, the order above quoted was entered of record by the Superior Court. The bond therein provided for was afterward approved and filed.

The contention on behalf of appellant is that the provision in said order that the decree "be stayed during the pendency of this appeal" operated as such a stay pending the appeal from this court to the Supreme Court.

No case decided in this State is cited by either party upon this point. Neither do we recall any such case. The case of *Russell v. O'Dowd*, 48 Ga. 474, seems to support the position of appellants, although that case is very different in some respects from the case at bar. But we understand the opinion by the Supreme Court of the United States in the *Slaughter House* cases (10 Wallace, 273) to be quite the reverse.

In those cases injunctions had been granted by the District Courts of the State of Louisiana. The cases were all

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taken, by what are known in Louisiana as "suspensive appeals," to the Supreme Court of that State, where the holdings by the District Courts were sustained. To the judgment of the State Supreme Court writs of error were taken from the Supreme Court of the United States, and when, afterward, it was sought to enforce the injunctions granted by the District Court and affirmed by the Supreme Court of Louisiana, a motion was made in the Supreme Court of the United States for an order of injunction and superseas to prevent the enforcing of said injunctions. That motion was denied, upon the theory that a superseas from the Supreme Court of the United States to the Supreme Court of a State in a case taken to the former court by writ of error (same in effect as an appeal), does not operate upon the District Court where the injunction was issued, but operates only upon the Supreme Court of the State to which the writ of error is directed.

We prefer to follow the opinion of the Supreme Court of the United States rather than that of Georgia, if they are, in fact, in conflict.

The order entered by the Superior Court in terms applies only to the appeal to this court. The appeal bond applies only to the appeal to this court. If parties desired to have the stay order continued upon another appeal, they should have applied to this court when taking such further appeal to have a stay order entered, the same as they did to the Superior Court when taking an appeal from its judgment or decree. Or the order of the Superior Court might have been so made as to apply in case of an appeal to the Supreme Court.

There being no error in this record called to our attention, the order of the Superior Court appealed from is affirmed.

**Moritz Kaufman v. The People ex rel., etc.**

1. **JUSTICES OF THE PEACE—Of the City of Chicago.**—Justices of the peace in the city of Chicago are appointed by the governor, by and with the advice and consent of the Senate, upon the recommendation of a majority of the judges of the Circuit, Superior and County Courts in and for such districts as are provided by law.

2. **SAME—Duty of the Judges, etc.**—It is the duty of such judges, a majority concurring therein, to recommend to the governor on or before the first day of June in the year of our Lord, 1895, and every four years thereafter, among other persons to fill the offices of justice of the peace in the different towns of Chicago, five competent persons to fill the office of justice of the peace in the town of Lake View, and the governor shall nominate the persons thus recommended, and by and with the advice and consent of the Senate (a majority of the senators elected concurring by yeas and nays) appoint them to be justices of the peace in and for said towns respectively.

3. **SAME—In Case the Governor or Senate Rejects, Duty of the Judges.**—In case the governor rejects any person recommended, or the Senate refuses to confirm any person nominated, the governor shall give notice of such rejection or refusal to the said judges, who shall, within ten days after the receiving of such notice, recommend some other fit and competent person for such appointment.

4. **SAME—Qualifications of Persons Recommended.**—Such persons so recommended shall be electors in the town in and for which they are to be appointed as such justices of the peace.

5. **SAME—Commission—Term.**—Justices of the peace so appointed shall be commissioned by the governor and hold their office four years, and until their successors have been commissioned and qualified, and shall have the same qualifications, jurisdiction, power and authority, and be subject to the same liabilities, execute bonds and be sworn in and governed by the same rules and regulations as justices of the peace who are elected.

6. **SAME—Authority to Recommend a Successor for any Particular Office of Justice.**—The judges, in recommending persons to fill the offices of justices of the peace, have power to make recommendations as to succession as a necessary part of the duty of the judges.

**Quo Warranto.**—Appeal from the Superior Court of Cook County; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed November 2, 1899.

**Statement by the Court.**—On petition of the State's attorney of Cook County, leave was given by the Superior

Court to file a petition in the nature of quo warranto. The information was filed for the use of the people at the relation of Henry Bonnefoi against the respondent, Moritz Kaufman, by which it was charged that Kaufman unlawfully held, and executes without any warrant or right, the office of justice of the peace for the town of Lake View in Cook county, and that he usurped and still usurps the rights and duties of said office.

The respondent demurred generally, which demurrer having been overruled by the court, he refused to plead further and abided by his demurrer, whereupon judgment of ouster from said office was entered against respondent, from which he has appealed to this court.

It appears from the allegations of the information that on June 13, 1891, Kaufman was duly commissioned as a justice of the peace by the then governor of Illinois, to have and hold the office until his successor should be appointed and qualified; that prior to the execution of said commission said Kaufman, with John A. Mahoney, C. J. Whitney, Henry J. Sampson and Vincent S. Boggs, were recommended as justices of the peace for the town of Lake View by a majority of the judges of said county to the governor of Illinois; that said names so recommended by the judges were also recommended by the governor for confirmation by the Senate of Illinois, and that the same names were confirmed by said Senate; that said Kaufman and said other parties respectively took the oath of office, and in all things complied with the law of this State requisite to the holding of said office, and that said Kaufman has ever since June 13, 1891, acted as a justice of the peace, and continues to so act, although said Kaufman has not since said date been nominated by the judges of the Circuit, Superior, County and Probate Courts of Cook County to the office of justice of the peace nor has he since said date been nominated by the governor nor confirmed by the Senate of the State of Illinois; that he continues to hold the office of justice of the peace, and claims so to do because no successor has been duly and legally appointed or has



qualified to the office so held by him by virtue of his commission of June 13, 1891.

It further appears that on April 19, 1895, a majority of the judges of said county recommended to the then governor of Illinois the names of five persons for the respective offices of justices of the peace for said Lake View, as follows: Henry Bonnefoi to succeed Moritz Kaufman; Mibra James to succeed Henry J. Sampson; Niles E. Olson to succeed Vincent S. Boggs; John A. Mahoney to succeed himself, and C. J. Whitney to succeed himself; and that the said names were so recommended to the governor in a written communication signed by said judges; that said governor nominated three persons from the list so recommended, as follows: said Mahoney to succeed himself; said Bonnefoi to succeed said Sampson; and said Olson to succeed said Whitney; and that the names of these three persons were sent by the governor in a written communication to the Senate; that the Senate confirmed the nominations so made by the governor, and subsequently said Bonnefoi took the oath of office and received a commission from the governor, and has in all things complied with the law of Illinois relating to the office of justice of the peace; that on April 8, 1899, a majority of said judges recommended and certified to the then governor of Illinois the name of said Bonnefoi as justice of the peace for said town of Lake View, "to succeed himself as justice of the peace in and for the town of Lake View, and to hold the said office held by Moritz Kaufman on June 1st, 1895," which recommendation was certified in writing to the governor; that said governor nominated said Bonnefoi, as recommended by said judges, and transmitted the same to the Senate of Illinois for confirmation; that afterward said nomination by the governor was confirmed by the Senate and the governor so notified, and afterward, on April 24, 1899, said Bonnefoi took the oath of office as such justice of the peace and received from the governor of Illinois his commission, which was duly recorded in the office of the county clerk of Cook county on the day last aforesaid, and from thenceforward has con-

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tinued and still continues to hold the said office; but that notwithstanding the matters aforesaid, said Kaufman still holds and executes, without any warrant whatsoever, the office of said justice of the peace of the town of Lake View in Cook county, and thus usurps the rights and privileges of said office.

ADOLPH MOSES, attorney for appellant.

CHARLES S. DENEEN, State's Attorney, and F. S. BARNETT, Assistant State's Attorney, attorneys for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

The Constitution of 1870, Art. 6, Sec. 28, is as follows :

" All justices of the peace in the city of Chicago shall be appointed by the governor, by and with the advice and consent of the Senate, but only upon the recommendation of a majority of the judges of the Circuit, Superior and County Courts, and for such districts as are now or shall hereafter be provided by law. They shall hold their offices for four years, and until their successors have been commissioned and qualified." \* \* \*

The exercise of the power thus conferred by the Constitution regarding the appointment of justices of the peace was the subject of legislative enactment by the general assembly of this State in 1871, which was subsequently amended, after the annexation of the town of Lake View to the city of Chicago, by an act in force July 1, 1895 (Hurd's Rev. Stat. 1897, Chap. 79, Sec. 2), as follows :

" It shall be the duty of the judges of the Circuit, Superior, Probate and County Courts of Cook County, a majority of the judges concurring therein, on or before the first day of June in the year of our Lord 1895, and every four years thereafter, to recommend to the governor " \* \* \* (among other persons to fill the offices of justice of the peace in the different towns of Chicago) " five fit and competent persons to fill the office of justice of the peace in the town of Lake View;" \* \* \* " and the persons thus recommended the governor shall nominate, and by and with the advice and consent of the Senate (a majority of the senators elected concurring by yeas and nays) appoint justices of the peace in and for

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each of said towns respectively; and in case the governor rejects any person recommended, or the Senate refuses to confirm any person nominated, the governor shall give notice of such rejection or refusal to the said judges, who shall, within ten days after the receiving of such notice, recommend some other fit and competent person for such appointment. Such persons so recommended shall be electors in the town in and for which they are to be appointed such justices of the peace."

Section 3 of the same chapter is as follows :

"Justices of the peace appointed under the preceding section shall be commissioned by the governor, and hold their office four years and until their successors have been commissioned and qualified, and shall have the same qualifications for holding office, the same jurisdiction, power and authority, and be subject to the same liabilities, and shall execute bonds and be sworn and be governed by the same rules and regulations as justices of the peace elected."

It is contended by counsel for respondent "that no successor has legally been appointed for Justice Kaufman, and that the petition fails to show such legal appointment. He is, therefore, under the Constitution, a good officer."

And it is argued that the judges, in performing their duties under the above quoted provisions of the Constitution and statutes, act only in a ministerial capacity, and can exercise no implied powers; that they had performed their whole duty when they recommended persons to the governor for justices of the peace for the town of Lake View, and have no warrant of law to designate or recommend a successor for any particular office of justice in said town; and also that, if it be conceded that the judges have such power as to the succession, under the facts of this case, the power was exhausted when the judges recommended Henry Bonnefoi to succeed himself, and that the additional recommendation that he hold the office held by Kaufman on June 1, 1895, was a nullity.

The exact question here presented does not appear to have been decided by any court of review in this State, but we are of opinion that the construction given by the

Supreme Court to the constitutional provision here in question in the case of *People v. O'Toole*, 164 Ill. 344-50, may be properly applied to the case at bar, and is conclusive as to the question here presented, of the power of the judges.

In that case the questions presented for decision were as to the power of the governor to change the recommendations of the judges as to the succession of persons recommended by them for offices of justices of the peace in the town of Lake, in the city of Chicago, said town being entitled under the law to five justices; also as to the power of the county clerk to designate the succession of persons commissioned as justices of the peace by the governor. It was held that the governor could not change the recommendation of the judges as to succession, and also that the county clerk had no power to designate the succession.

We are of opinion that it necessarily follows from this decision that the governor could not change the recommendation as to succession; that the judges had power to make the recommendation as to succession.

The court says, at p. 350 :

"The concurrence of the three agencies of the government is necessary, under the Constitution, to appoint a man to the office, and all these agencies must join in the manner provided by the Constitution. No person was recommended by the judges to succeed to the office which the defendant held, and we think that it was not within the power of the governor to confer upon Rhoades the title to the office which the defendant held without such recommendation;" also, on page 353 : "The necessary steps to vest a person with the office which the defendant O'Toole has held are a recommendation to such office by a majority of the judges, advice and consent by the Senate to the appointment, and the appointment by the governor. This method is pointed out by the Constitution and we think clearly demonstrates the invalidity of any other."

It may be true that, under the facts of the *O'Toole* case, it was unnecessary for the court to have made so sweeping a ruling as it did, to wit, that no other appointment than the method designated by it was a valid appointment, but

it was necessary for the court, in order to determine the question before it, to construe the constitutional provision, and we think the construction is a reasonable one and should control in the decision of the case at bar.

If it be conceded that the power conferred upon the judges by the Constitution and statute is a ministerial one, still we are of opinion that the language of both the Constitution and statute is such that the power conferred, as to the designation of a successor to each office, is an express power.

The Constitution says that justices shall be appointed "by the governor by and with the advice and consent of the Senate (but only upon a recommendation of a majority of the judges)," etc.

The statute says it shall be the duty of the judges, a majority concurring, to recommend to the governor "five fit and competent persons to fill the office of justice of peace in the town of Lake View."

The Supreme Court, in the O'Toole case, *supra*, says:

"When the term for which the defendant was appointed expired, the governor was authorized to appoint another person as his successor. The method of doing so, as provided in the Constitution, was that the judges should recommend the person, and the governor, with the advice and consent of the Senate, should appoint him. If there were but one justice of the peace and one court of the grade in the town of Lake, there would be no question as to what office the appointee would take. But there are five justices to be appointed for that town, holding five distinct courts, so that there must be a line of succession created in the descent of each of these offices. The fact that there are a number of distinct offices of the same grade in the town should not create any confusion. Justices of the peace are a part of the judicial department of the State provided for in the Constitution, and while known only by the name of the incumbent of the office, yet each justice court is distinct and separate from all others."

It can not be said that the judges performed their full duty under the law until they designated a person to be the successor to each particular office of justice of the peace in the town of Lake View. The failure to make such

designation, there being five offices in the town to be filled, would necessarily create confusion. The designation of a person to fill each office of justice in the town is a necessary part of the duty of the judges. Their recommendation is not complete without it. Until the judges act, in this regard, no appointment can legally be made to a particular office of justice in the town. The judges must act before the power of the governor or of the Senate can be of any avail. Neither the governor nor the Senate has any original power, nor can either the governor or Senate change a recommendation made by the judges. All three, the judges, governor and Senate, must concur.

Because the legislature has not, in so many words, said that the judges shall have power to designate the succession to any particular office of justice in the city of Chicago, it does not follow that they have not that power. It necessarily follows from the power of recommendation given, in the absence of express words to the contrary, that such power includes the right of designation of a successor to each office, there being five offices of justice of the peace in the town of Lake View. Any other construction of the power would lead to needless confusion and absurd results. A justice once appointed and qualified under the law might continue during his life to act as justice if the judges have no power to recommend a successor. No such absurd and unreasonable intention should be attributed to the legislature if it can be reasonably avoided.

The power attempted to be exercised by the judges, as indicated by the words in the recommendation of the judges to the governor, of Henry Bonnefoi "to succeed himself," it is claimed, exhausts all power of recommendation as to succession by the judges, conceding they had any power. The succession to the office of justice of the peace is what they should have recommended. This they did when they recommended Henry Bonnefoi to hold the office of justice of the peace in the town of Lake View held by Moritz Kaufman on June 1, 1895. If Henry Bonnefoi was not a legal justice of the peace on April 8, 1899, in the

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town of Lake View, which it is unnecessary in this case for us to decide and we do not decide, then the recommendation of the judges that he succeed himself must be considered a nullity. If he was a legal justice of the peace on that date, then when the recommendation of the judges is considered as a whole, and it must be so considered, it is apparent that the intent of the recommendation is that he should succeed to the office held by Kaufman on June 1, 1895. The judgment of the Superior Court is affirmed.

## Bernard Curtis v. Henry S. Hawley.

1. CONSTRUCTION OF CONTRACTS—*Circumstances Under Which a Contract is Executed.*—The intention of the parties to a contract is to be ascertained from the contract, regard being had to the circumstances under which it was executed. It can not be presumed that such parties used terms without intending some meaning should be given to them.

2. SAME—*Interpretation of the Contracting Parties.*—It is allowable always to look to the interpretation the contracting parties place on their agreement, either contemporaneously or in its performance, for assistance in ascertaining its true meaning, and it should not be so construed as to give one party an unreasonable advantage over the other, unless such is the manifest intention.

3. ABSTRACTS OF TITLE—*Defined.*—The term “abstract,” as used in relation to land, is commonly understood to mean a writing in which is set forth the chain of the record title, containing all matters of record affecting the title and necessary to be considered in determining in whom the record title was at a date named.

4. CONVEYANCES—*To Correct Errors—Effect of—Construction.*—Where an administrator, in the right of his wife, joins in a conveyance of real estate (for, by the common law, the husband of an administratrix was an administrator in right of his wife) to remedy a defect in a former conveyance by him of the same premises, he does not thereby release covenants made to him individually, and not as administrator. Such conveyance will have all the effect intended by the statute, the court and the grantors, without affecting the individual rights or obligations of any of the grantors.

*Assumpsit, for money paid, etc.*—Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed November 3, 1899.

85	429
90	313
85	429
98	1560
85	429
114	2447

THOMAS E. D. BRADLEY, attorney for appellant.

In the construction of contracts the general rule is that the intention of the parties shall be ascertained and adopted if possible. Bishop on Contracts, Sec. 380; *Field v. Leiter*, 118 Ill. 17.

The second principal rule of construction is that words are to be understood in their ordinary and popular meaning. Lawson on Contracts, Sec. 387; *Stearns v. Sweet*, 78 Ill. 446.

Another cardinal rule of construction is that where a contract will admit of more than one construction, and the parties to it have, by their own conduct, placed a construction upon it which is reasonable, such construction will be adopted by the courts in the event of litigation concerning it. *The People v. Murphy*, 119 Ill. 159.

Where an authority is given by law to executors, administrators, guardians or other officers, to make sales of lands, upon being duly licensed by the courts, and they are required to advertise the sales in a particular manner and to observe other formalities in their proceedings, the lapse of sufficient time (which in most cases is fixed at thirty years) raises a conclusive presumption that all the legal formalities of the sale were observed. 1 Greenl. on Ev., Sec. 20.

K. K. KNAPP, attorney for appellee.

"The law is, that one who advances money in part payment of a parol purchase of land, can not recover it back, till he has offered to fulfill the parol agreement, and the other party has repudiated it by refusing to perform." *Crabtree v. Wells*, 19 Ill. 55.

The intention of the parties to a deed is of prime importance in construing the deed. If the court can learn the intention of the parties the transaction will be construed so as to carry that intention into effect. *Lehndorf v. Cope*, 122 Ill. 317; *Piper v. Connelly*, 108 Ill. 651.

If one makes a feoffment with warranty to the feoffee, his heirs and assigns, and the feoffee re-infeoffs the feoffor and his wife, or the feoffor and a stranger, in these cases the warranty is not defeated. Bacon, Vol. 10, 413; 19 Am.



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& Eng. Ency., 1021, n. 4; Hobbs v. King, 59 Ky. (2 Met.) 139. When one conveys in his own right and afterwards acquires title in trust, express or implied, there is no estoppel. Kelley v. Jenness, 50 Me. 455; Jackson v. Hoffman, 9 Cowen, 273; Sinclair v. Jackson, 8 Cowen, 565.

MR. JUSTICE ADAMS delivered the opinion of the court.

The appellant purchased from appellee certain premises in Lake county, Illinois, known as Slusser's Park, and paid to appellee \$500 of the purchase money, for which appellee gave a receipt, as follows:

"October 4, 1892.

Received of B. Curtis, five hundred dollars, on account of purchase of property at Gray's Lake, known as Slusser's Park, for the sum of seven thousand dollars, provided the abstract is correct; if not satisfactory, the money is to be returned.

HENRY S. HAWLEY."

Appellee, in pursuance of the agreement, delivered to F. W. Young, appellant's attorney, about October 6th or 7th, an abstract of the title to the premises. Mr. Young examined the abstract and, in his opinion thereon, made several objections to it, all of which, except one, were waived by appellant. The objection not waived, but insisted on, is as follows:

"Garwood and wife conveyed to Doddridge Bryant by deed dated December 5, 1850. For some reason or other the administrators, joined by Bryant as the husband of one of them, made a new deed to Samuel Garwood, dated March 21, 1854, several years after Bryant had acquired the title. If this deed had any effect, it operated to revest the title in Samuel Garwood, and so far as the abstract shows, that title remains in him yet. The present title is derived through Bryant, but the legal record title appears to be outstanding in Garwood."

On this opinion being given, the appellant declared that the abstract was not satisfactory to him. Young's opinion was written October 11th, and the next day he went, at appellant's request, to appellee's office and explained to appellee the objection to the title above stated, when he, Young, says that appellee said that he could straighten it up in a little time—a week or ten days. Subsequently, the

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following correspondence, illustrating the views of the parties, took place between Young and appellee:

"October 15, 1892.

F. W. YOUNG, Esq., R. 24 Reaper Block, Chicago, Ill.

DEAR SIR: I return you herewith abstract to my property at Gray's Lake, and your opinion of title to same. Also enclose you herewith letter written me by Mr. Whitney, of Waukegan, dated October 14, explaining certain questions raised by you in the opinion given by you to Mr. Curtis. You will also notice that the abstractor made a mistake in copying description of the deed from Ender to me. Mr. Whitney had the abstract corrected and sent the deed to me, which shows that the description of the deed was correct.

I trust Mr. Whitney's letter referred to will enable you to pass title to this property."

Yours truly,

HENRY S. HAWLEY."

"Oct. 20, 1892.

MR. HENRY S. HAWLEY:

DEAR SIR: I have reply from Mr. Whitney with copy additional records, leaving, however, the defect (as I view it) unchanged. Mr. Whitney thinks it is no defect. I am sorry to say that I can not agree with him and can not take the responsibility of reporting a perfect title unless a quit-claim deed can be obtained from Samuel Garwood if living, or his heirs if dead, or a proceeding be carried through court to dispose of what I regard as the interest outstanding in him.

Yours very respt.,

F. W. YOUNG."

"CHICAGO, Oct. 28, 1892.

F. W. YOUNG, Esq., attorney, Reaper Block, Chicago, Ill.

DEAR SIR: Yours of the 20th inst. at hand. I am advised and believe that the title to the property sold by me to Mr. Curtis is perfect, but in order to satisfy you and to avoid any misunderstanding, I have taken steps to find Samuel Garwood if living, or his heirs if dead, and will attempt to procure the quit-claim deed suggested by you. At the same time I wish to state that if I am unable to do this I shall still expect Mr. Curtis to accept the property and pay the purchase price as agreed.

I hope to be able to inform you whether I can find Samuel Garwood, if living, or his heirs if dead, within a few days.

Yours truly,

HENRY S. HAWLEY."

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Curtis v. Hawley.

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"Oct. 29th, 1892.

MR. HENRY S. HAWLEY:

DEAR SIR: Yours of 28th rec'd. I am surprised that better lawyers than myself (and I have no doubt but that they are all better than I am) should differ with me upon the question involved in the validity of your title.

I hope you will succeed in settling the matter in the way suggested. I will certainly not advise Mr. Curtis to accept the title unless the objection be removed, and I have no fears from what may result from any legal contest that may grow out of the matter.

Yours very respectfully,

F. W. YOUNG."

"November 9th, 1892.

MR. HENRY S. HAWLEY:

Mr. Curtis is very much put out by the delay in perfecting the title to the Gray's Lake property. He expected from the purport of your letter of the 28th and our subsequent telephone communications that the matter would be settled one way or another long before this time. He is waiting at great inconvenience, as other pending arrangements are kept in suspense depending on the outcome of this. He returned to Burlington last evening and desired me to say to you that he will hold himself in readiness to be called back by telegraph any time this week, if you succeed as proposed in procuring the quit-claim deed to perfect title, but that if you do not succeed in perfecting the title so that the transaction between you and himself can be carried out before the end of the present week (which is certainly a reasonable length of time) he will consider that the transaction is not to be carried out.

Yours very respectfully,

F. W. YOUNG."

"Dec. 6, 1892.

MR. HENRY S. HAWLEY:

DEAR SIR: I suppose it may now be regarded as settled that the trade between you and Mr. Curtis relative to the Gray's Lake property is off, and nothing remains to be done but surrender your receipt and take check for the \$500 earnest money.

Mr. Curtis has left the receipt with me to be surrendered for check. Shall I send it to your office or will you send for it?

Yours respectfully,

F. W. YOUNG."

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Curtis v. Hawley.

" December 7, 1892.

F. W. YOUNG, Esq., 95 Clark St., Chicago, Ill.

DEAR SIR: Your letter 6th inst. received. I do not understand that the trade between Mr. Curtis and myself is off. As I wrote you Oct. 28, I am advised and believe that the title to the property sold by me to Mr. Curtis is perfect, but in order to satisfy you and avoid any misunderstanding, I immediately upon receipt of your letter of Oct. 20th took steps to find Samuel Garwood, if living, or his heirs, if dead, and obtain quit-claim from him or them. Doing this, however, simply to satisfy you; and had I not succeeded I should still expect Mr. Curtis to accept the property and pay the purchase price as agreed. I have obtained at considerable expense and trouble a quit-claim deed from all the heirs of Samuel Garwood, and am ready to deliver same to Mr. Curtis with warranty deed to the property, and would request that you name early date when this transaction can be closed.

Yours truly,

HENRY S. HAWLEY."

" Dec. 8, 1892.

MR. HENRY S. HAWLEY:

DEAR SIR: Your favor of 7th inst. is rec'd. Regret to note from tenor of its contents that there is prospect of a lawsuit about the money; for Mr. Curtis has now no use for the property, having been obliged to provide other property after waiting a longer time even than you demanded for you to perfect title.

Yours very respt.,

F. W. YOUNG."

Appellant testified that Mr. Young was authorized by him to write the letters signed by Mr. Young. No reply was received to Young's letter of November 9th. It appears from the evidence that appellant was lessee of and occupying certain premises at Burlington, Wisconsin, his lease of which expired November 10, 1892, and that he purchased the leased premises about the middle of November and they were conveyed to him about December 24, 1892. It is contended by counsel for appellee that all that is meant by the receipt in question is that appellee should furnish a correct abstract, showing the title of record, which abstract, considered as an abstract, should be satisfactory to appellant; that the words used in the receipt do not

mean or contemplate that appellee should furnish an abstract showing the recorded legal title in him; that no objection was made by appellant to the abstract as an abstract, but merely that it did not show title in appellee. In other words, appellee's counsel contends that even though the abstract should plainly show that the title to the premises was in a third party, and that appellee never had any interest in the premises, yet if the abstract was correct in so showing, and that, in being correct, it was satisfactory as an abstract, appellee would have discharged his undertaking, and there can be no recovery. It necessarily follows from this construction that the provision for an abstract can subserve no useful purpose; that it is utterly meaningless, and that appellant is practically in the same situation he would have been in had there been no provision in the receipt for the return to him of the money paid. A construction logically resulting in such an absurdity must be rejected.

Counsel for appellant, on the other hand, contends that the question is one of good faith; that if appellant, in good faith, objected to the title, as shown by the abstract, that was the end of the matter, and there can be no recovery. In other words, notwithstanding the abstract shows legal title in appellee, yet if appellant honestly and in good faith, but mistakenly, expressed dissatisfaction with the title, he is entitled to recover. Neither can we agree with this contention.

The intention of the parties to a contract is to be ascertained from the contract, regard being had to the circumstances under which it was executed. *Turpin v. B. O. & C. R. R. Co.*, 105 Ill. 11; *Piper v. Connelly*, 108 Ib. 646, 651; *Kuecken v. Voltz*, 110 Ib. 264.

And it can not be presumed that the parties used words or terms without intending some meaning should be given to them. *Lehndorf v. Cope*, 122 Ill. 317, 322.

And "it is allowable, always, to look to the interpretation the contracting parties placed on their agreement, either contemporaneously or in its performance, for assist-

ance in ascertaining its true meaning." Vermont St. M. E. Church v. Brose, 104 Ill. 206, 212.

A contract should not be so construed as to give one party an unreasonable advantage over the other, unless such was the manifest intention. Gale v. Dean, 20 Ill. 320, 323.

Appellant had purchased from appellee certain premises at an agreed price, and was willing to complete the purchase by payment of the entire agreed price, on appellee furnishing a correct and satisfactory abstract, and appellee agreed to furnish such an abstract. The word abstract, as used in relation to land, is commonly understood to mean a writing in which is set forth the chain of the record title, and containing all matters of record affecting the title, and necessary to be considered in determining in whom the record title was at the date of the abstract. Such was the abstract which appellant required and which appellee agreed to furnish. Can it be reasonably contended that it was the intention of appellee to furnish an abstract showing title in a stranger to premises of which he claimed to be the owner and for which he asked \$7,000, or the intention of the appellant to pay that sum on evidence, however correct, that appellee was not the owner? Such contention is manifestly absurd. The parties practically construed the contract otherwise. Appellant made no objection to the abstract as being incorrect, or at all, as an abstract. His objection was that it showed the legal title to be in Garwood and not in appellee. Neither did appellee contend merely that it was a correct abstract, and, therefore, should be satisfactory, but, while insisting that it showed the title in himself, undertook, for the purpose of obviating appellant's objection, to obtain a quit-claim clearing up the objection. If the abstract showed an outstanding legal title in Garwood, appellant is entitled to recover, and *vice versa*.

The following appears from the abstract: David Hendee died intestate August 26, 1848, being at the time of his death the owner in fee of the premises; and September 30, 1848, letters of administration of his estate were issued to his widow, Ann W. Hendee, and Orville Slusser.

March 8, 1850, Ann W. Hendee and Doddridge Bryant were married.

May 10, 1850, a petition was filed in the County Court of Lake County by Orville Slusser and Ann W. Bryant, administrators of the estate of David Hendee, deceased, and Doddridge Bryant, administrator in right of his wife, for leave to sell real estate to pay debts. May 13, 1850, the County Court entered an order granting the prayer of the petition and ordering the sale of the premises in question.

July 6, 1850, Doddridge Bryant, Orville Slusser and Ann W. Bryant, administrators of the estate of David Hendee, deceased, conveyed the premises by special warranty deed to Samuel Garwood, and the deed was recorded February 23, 1854. It is noted in the abstract that this deed recites the entering of the order and decree of sale; also that the sale was confirmed.

December 5, 1850, Samuel Garwood and wife executed to Doddridge Bryant a special warranty deed of the premises, which, February 23, 1854, was recorded.

March 21, 1854, Ann W. Bryant, late Hendee, and Orville Slusser, administrators of the estate of David Hendee, deceased, and Doddridge Bryant, "administrator in right of wife in said estate," conveyed the premises to Samuel Garwood, which conveyance was recorded March 22, 1854. In this deed the decree of the County Court ordering sale was recited in full.

The contention of counsel for appellee is, that the deed of July 6, 1850, from the administrators to Samuel Garwood, was void, in that it did not set forth at large the order of the County Court directing a sale, but merely recited the entry of that order; and that the deed from the administrators to Garwood of March 21, 1854, in which the order of the County Court is set forth at large, was made to correct the error in the deed of July 6, 1850; and that, by virtue of the covenants in the deed of December 5, 1850, from Garwood and wife to Bryant, the title conveyed to Garwood by the second administrators' deed inured to Bryant. Appellant, on the contrary, contends that Bryant,

by joining in the deed of March 21, 1854, as a grantor, released the covenants in the deed from Garwood and wife to him, leaving the legal title in Garwood. The act in relation to husband and wife had not then been passed, and by the common law, the husband of an administratrix was an administrator in right of his wife. Schouler's Executors and Administrators, Sec. 106; 7 Am. & Eng. Ency., 1st Ed., Vol. 7, p. 175, note.

Bryant, as such administrator, joined in the petition to the County Court for leave to sell the premises; the court granted an order of sale as prayed for; the statute then in force provided that the sale should be made and the conveyance executed by the executor or administrator applying for the order (Rev. Stat. 1845, Sec. 105), and Bryant joined in the conveyance "as administrator in right of wife in said estate."

Counsel for appellant cites *Huls v. Buntin*, 47 Ill. 399, in support of the proposition that it is not necessary to the validity of the deed of an administratrix that her husband should join in it as a grantor, which may be conceded, but it does not follow that prior to the passage of the act of 1861, and while the common law as to husband and wife remained in force, he might not have so joined. Besides, Bryant having joined as administrator in right of his wife in the application for the order of sale, and the statute providing that the administrator applying for such order should execute the conveyance, we are not prepared to say that it was unnecessary for him to join in the conveyance. But the intention of Bryant in joining in the deed is to be looked to (*Piper v. Connelly*, 108 Ill. 646; *Lehndorf v. Cope*, 122, Ib. 317), and it is, we think, apparent that he so joined merely as administrator in right of his wife, and for the sole purpose of correcting the fatal defect in the deed to Garwood of July 6, 1850, which deed was invalid in not setting out the order of the County Court at large. *Smith v. Hileman*, 1 Scam. 323.

Suppose Bryant had been the sole administrator and, acting as such, had executed the deed to Garwood of March



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21, 1854, could it be successfully contended that he thereby released covenants made to him individually and not as administrator? Clearly not; and if by the execution of such a deed, as sole administrator, he would not release covenants personal to himself, how could it be said that by joining as administrator with other administrators he released such covenants?

Counsel for appellant cites *Vincent v. Morrison*, Breese, 230, to the effect that covenants of warranty in a deed by administrators bind the administrators personally. In such case the administrators, in making such covenants, are not acting as administrators, because as administrators they can not bind the estate or the heirs by covenants of warranty, and to give the covenants any force they must be held to bind the administrators. In the present case the conveyance can have all the effect intended by the statute, the County Court and the grantors, without affecting the individual rights or obligations of any of the grantors.

We are of opinion that the title to the premises conveyed by the administrators' deed of July 6, 1850, to Samuel Garwood, passed by inurement to Doddridge Bryant, by virtue of the covenants in the former deed from Garwood and wife to Bryant, and that there is not, so far as shown by the abstract, any outstanding legal title in Garwood.

Counsel for appellant has urged other objections, none of which we deem tenable. The judgment will be affirmed.

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**Mary McNamara, Impleaded, etc., v. Thomas Clark.**

1. **PROMISSORY NOTES—Payments to Unauthorized Persons.**—A person who makes payments upon a promissory note to a person representing himself to be and whom he believed to be the agent of the owner and holder of such note, without requiring him to produce the note, and being informed, by the receipt for the payment made, that the note was at the time in the possession of the owner, makes such payments at his peril.

2. **SAME—Where a Note is Made Payable at a Particular Place.**—

The mere fact that a note is made payable at a particular place does not relieve one who pays it at that place from being required to pay it again if the note is not there.

3. *SAME—Equitable Assignments.*—An indorsement of a promissory note, as follows—“Pay to the order of Thomas Clark. Patrick McNamara, per P. W. Snowhook,” taken together with the delivery of the note and trust deed securing it, and the payment therefor by him, and his subsequent continued possession of the same, amounts clearly to an equitable assignment thereof to him, and entitles him to maintain a bill to foreclose the trust deed, and he can not be required to prove either the execution of the note or its assignment to him, in the absence of any issue raised by the pleadings concerning such assignment and execution.

4. *PARTIES—Assignors of Notes and Trust Deeds.*—In a proceeding to foreclose a trust deed, by the assignee of the note and trust deed, the assignor is not a necessary party.

*Foreclosure of a Trust Deed.*—Appeal from the Circuit Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1899. Affirmed. Opinion filed November 7, 1899.

*Statement of Case.*—This is an appeal by Mary McNamara from a decree of the Superior Court in proceedings to foreclose a deed of trust, executed by her with her husband (now deceased), to secure her note of \$600. Her defense was payment of note in full and release of the trust deed by Patrick W. Snowhook, the trustee.

On October 23, 1896, Mary McNamara obtained a loan through Patrick W. Snowhook, an attorney, of \$600, and gave her note therefor, secured by a deed of trust, conveying to Snowhook her homestead. The note was an ordinary promissory note, due three years after date, to the order of Patrick McNamara (no relation to appellant), with interest at seven per cent per annum, eight per cent after maturity. “Principal and interest payable at the office of Patrick W. Snowhook.” Mary McNamara never saw Patrick McNamara, but says she thought Snowhook was his agent.

Subsequently (the exact time is disputed) Snowhook bought the note of Patrick McNamara, whose whereabouts are thereafter unknown. Snowhook afterward, presumably

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before maturity, sold the note to the appellee, Thomas Clark, who took it and the trust deed home, and kept them in his possession, except when he brought them with other notes purchased from Snowhook to receive his interest thereon, which interest would then be indorsed on the note by Snowhook. Indorsed on the note are these words :

“Pay to the order of Thomas Clark.

PATRICK McNAMARA,  
Per P. W. Snowhook.”

There is no evidence as to when, how, or by whom, this indorsement was made.

It is written on the note just below the indorsement of interest paid to “Oct. 23, 1888,” and just above the indorsement of interest, paid to “April 23, 1889.”

Mary McNamara knew nothing of these transfers, but paid her semi-annual installments of interest to Snowhook at his office when they fell due. On October 21, 1889, she paid Snowhook at his office \$300, on account of the principal of her note, making an agreement for an extension of the balance, and received a receipt, with agreement for extension, which is as follows :

“CHICAGO, Oct. 21, 1889.

Received of Mary McNamara the sum of three hundred (\$300) dollars, the same being paid to me to apply on her note in favor of Patrick McNamara, now in the hands of Thomas Clark, dated October 23, 1886, bearing interest at the rate of seven per cent per annum. Received also twenty-one (\$21) dollars, the same being the interest from April 23 to October 23, 1889, on said six hundred (\$600) dollars.

The payment of the balance of said note is to be extended for one year from this date at seven per cent. interest.

P. W. SNOWHOOK.”

Snowhook never paid this \$300 over to Clark, and never informed him of its payment, but when he came in with his note to receive his interest, paid over the interest and indorsed it on the note as usual.

On or about August 28, 1890, she paid the balance due on the note to Snowhook at his office, who gave her a release deed of the deed of trust, which release she at once recorded.

She did not ask for or receive the note or trust deed, but accepted Snowhook's statement that the release was all she needed. Clark had known Snowhook a long time and had purchased other notes and mortgages from him. He was ignorant of business methods, could not read and knew nothing about arithmetic and figures. He never received any of the payments on account of the principal of the note, and was not told that it had been paid, but Snowhook continued paying him installments of interest on \$600 down to and including April 23, 1894. In the fall of 1894, Clark told Snowhook that he was going to the old country and wanted the principal of this note paid on the following May, and Snowhook told him that he would have the money for him at that time, but Clark never received it.

BURLEY & MCSURELY, attorneys for appellant.

ROBERT E. PENDARVIS, attorney for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The payments made by appellant to Snowhook were made at her peril. Neither the note nor the trust deed were in the possession of Snowhook when she paid any part of the money here in controversy and, of course, were not produced to her at the time. She was expressly informed by the contents of the receipt and extension agreement given to her by Snowhook on October 21, 1889, which was before the note became due, that Clark, the appellee, held the note.

With that knowledge by her, she certainly may not equitably claim the right to be protected against her own act in making payment to anybody except Clark or his authorized agent, without production of the note.

The evidence fully justifies the finding by the master that Snowhook was not the agent of Clark to collect the principal of the note, and that appellant's payment thereof to Snowhook was made at her own risk.

The circumstances that appellant obtained the loan through Snowhook, that he was named as trustee in the

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trust deed, that the note was made payable at his office, and that interest had been paid to him, may furnish bases for barren intellectual inferences, but do very little more in aid of appellant.

The mere fact that a note is made payable at a particular place does not relieve one who pays its amount at that place from being required to pay it over again if the note be not there.

The cases of *Stiger v. Bent*, 111 Ill. 328, *Keohane v. Smith*, 97 Ill. 156, and *Viskocil v. Doktor*, 27 Ill. App. 232, may be referred to as disposing of the contentions of appellant in respect of the matters we have mentioned.

It is contended by appellant that there was no legal assignment to appellee of the note secured by the trust deed. The note is payable to the order of Patrick McNamara. On the back of the note is indorsed, "Pay to the order of Thomas Clark. Patrick McNamara, per P. W. Snowhook." There is no direct proof when or by whom such indorsement was made. From the fact that four payments of semi-annual interest, from October 23, 1886, to October 23, 1888, are indorsed upon the note before the indorsement of the above purported assignment, and that eleven indorsements of semi-annual interest down to April 23, 1894, follow after the indorsement of the purported assignment, it may be fairly inferred that the assignment to Clark took place upon or after October 23, 1888, and on or before April 23, 1889, which is the date of the first indorsement of interest following the purported assignment.

To make it plainer, perhaps, the indorsement of the assignment, as it appears on the back of the note, occurs between the indorsements of the payments of interest to October 23, 1888, and to April 23, 1889.

Appellant did not in her answer specifically deny the assignment of the note to appellee, although she did deny that he "is the holder and owner of any note made and executed by her."

It was proven that at the time appellee purchased the note and trust deed of Snowhook, they were delivered to

him, and that he ever afterward kept them in his possession, only taking the note to Snowhook whenever he went to collect the interest, but never leaving it with him.

We need not discuss whether the legal title of the note passed by the indorsement or not. Such indorsement, taken together with the delivery of the note and trust deed, and the payment therefor by appellee at the time, and his subsequent continued possession of them, amounted most clearly to an equitable assignment thereof to him, and entitled him to maintain his bill to foreclose. Nor was he required to prove either the execution of the note or its assignment to him, in the absence of any issue concerning the same being properly presented by appellant.

Nor need we discuss at length whether or not, under the circumstances, the note was subject to any equitable defenses in favor of the appellant, either as against appellee or the original payer of the note. The appellant does not claim any equities against the note prior to the time she paid three hundred dollars to Snowhook, on October 21, 1889, to apply on the principal sum, and at that time not only was the note not held or produced by Snowhook, but she was informed by the receipt and extension agreement then given her, that Clark, the appellant, was the holder of the note.

So, the real question comes back to that already disposed of, as to whether or not she made the payments on that day and subsequently, to Snowhook, at her own risk.

Some contention is made that Snowhook was the agent of the appellee, but the evidence is conclusive that he was not such agent for collection of the principal, and it is only as to payments on the principal of the note that controversy exists.

It is claimed by appellant that McNamara was a necessary party to the bill. The evidence showed, without contradiction, that after two or three payments of interest were made, McNamara desired to leave Chicago and wanted the money he had put into the loan, and that Snowhook bought the note and trust deed from him—paying therefor

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the principal and accrued interest—and received from him the papers, and afterward sold the same to appellee.

We see no necessity for McNamara being made a party. *Wilson v. Spring*, 64 Ill. 14.

There are some minor matters urged by appellant which do not require particular comment.

Upon the whole record we discover no material error, and the decree of the Superior Court is affirmed.

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**Anton Schlatt v. Charles L. Johnson.**

1. **TRUST DEEDS—*Rights of Holders of Interest Notes Matured.***—The holder of an interest coupon note due is not required to wait until the other notes secured by the trust deed are due before he takes steps to enforce it by foreclosure.

2. **SAME—*Decree on Default in Payment of One of the Coupon Notes.***—Where a suit in foreclosure is prosecuted for the non-payment of one in a series of interest notes it is proper to direct, by the decree, that the sale of the premises be made subject to the continuing lien of the trust deed, as security for the remaining interest notes.

**Foreclosure of Trust Deed.**—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed November 7, 1899.

HARRIS F. WILLIAMS, attorney for appellant.

OSCAR M. TORRISON, attorney for appellee.

The holder of a coupon interest note may foreclose the trust deed securing the same without making the holders of the principal note or the other interest notes parties, and upon such foreclosure it is proper that the decree should direct the sale to be made subject to the continuing lien of the trust deed for the security of the principal note and other coupon interest notes. *Boyer v. Chandler*, 160 Ill. 394; *Chandler v. O'Neil*, 62 Ill. App. 418; *Van Sant v. Allmon*, 23 Ill. 30; *Weiner v. Heintz*, 17 Ill. 259.

If complainant under his note had a lien prior to the lien of the unmatured principal and other interest notes, the complainant might have objected to a sale subject to the continuing lien of the trust deed as to such other notes, but he may waive such right, and the defendant mortgagor can not question it. *Van Sant v. Allmon*, 23 Ill. 30; *Boyer v. Chandler*, 160 Ill. 394; *Chandler v. O'Neil*, 62 Ill. App. 418.

MR. JUSTICE FREEMAN delivered the opinion of the court.

Appellee, as owner of an overdue coupon interest note, filed his bill to foreclose the trust deed securing said note, being the third in a series of ten interest coupon notes of like amount. The bill prays for a decree of sale subject to the continuing lien of the trust deed for the principal and remaining interest notes thereby secured.

The complainant introduced the interest note in evidence, testified that it was unpaid and that he was the owner before filing the bill; also that he had redeemed the property from sales for taxes and assessments, and made other outlays under the trust deed. No testimony was offered in behalf of appellant. The court found the material allegations of the bill proved; that appellee has a valid lien upon the premises in the trust deed described for the amount found due, subject however, to the continuing lien of the trust deed for the security of the principal and remaining interest notes, together with such other indebtedness as is by the trust deed secured, and a decree of sale was entered accordingly.

Appellant urges that the decree was erroneous in subjecting the premises to the continuing lien of the trust deed for security of the remaining notes, but fails to state wherein the alleged error lies. As is said in *Boyer v. Chandler*, 160 Ill. 394: "The holder of a note due is not required to wait until the notes secured by the same mortgage are due before he takes steps to enforce his security." In that case the foreclosure was sought as to coupon interest notes, as in this case. The decree directed that the sale of the premises be made subject to the continuing lien of



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the trust deed thereon, and it is said that "such decree is clearly recognized by the courts" in such cases.

The trust deed as to any other notes thereby secured is in effect a separate mortgage. *Chandler v. O'Neil*, 62 Ill. App. 418. The bill in this case and the decree thereunder do not affect the rights either of the holders of other notes secured by the trust deed, if any there be, who are not parties to the suit nor of the mortgagor in reference thereto.

We find no error in the decree of the Circuit Court, and it must be affirmed.

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### Albert Mohr and John Mohr & Sons v. James Kinnane.

1. INSTRUCTIONS—*Not to Assume Facts*.—In an action of trespass for assault and battery, where the evidence is close and conflicting, an instruction which assumes as a fact that violence was used is erroneous, as assuming the pivotal fact in issue, and in such respect is a clear invasion of the province of the jury.

2. TRESPASS—*Vi et armis*—*Violence Defined*.—The word violence has, for one of its meanings, an unjust or unwarranted exertion of power.

**Trespass.**—For assault and battery. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed November 7, 1899.

WALKER & EDDY, attorneys for appellants.

No appearance by appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

To a suit for assault and battery, the defendants, appellants here, pleaded the general issue, and special pleas in justification.

The jury returned a verdict for \$100 in appellee's favor, and from the judgement following this appeal is prosecuted.

Where, as here, the testimony upon the main issue is

close and conflicting, it is required that the instructions should be accurate.

The second instruction, given at the request of the plaintiff, appellee, is as follows:

"If the jury believe, from the evidence, that the defendant some time, on or about, etc., struck and kicked the plaintiff, as alleged in plaintiff's declaration, without sufficient provocation therefor, as explained in these instructions, and that the plaintiff was injured by such striking and kicking, and has suffered any damage therefrom, then the jury should find issues for the plaintiff. The court further instructs the jury that if they believe, from the evidence, that the defendant assaulted and beat the plaintiff, as charged in the declaration, then they should find the verdict for the plaintiff, unless they further believe, from the evidence, that such assaulting and beating, when done, were reasonably and apparently necessary in defense, etc., and that the force and violence used by defendant were no more than a reasonable man would have deemed reasonably necessary in such defense."

There was no attempt in this or in any other offered instruction to explain what was meant by, or would in law amount to, "sufficient provocation" to justify the assault, and the jury were, therefore, left free to find the fact in accordance with their own notion of what the law is in such respects.

Again, the latter part of the instruction assumes, as a fact, that violence was used. The plea of justification admitted the use of force, but only to the extent that was necessary to remove the plaintiff from the premises. The word violence has for one of its meanings, an "unjust or unwarranted exertion of power" (Cent. Dict.), and for the court to assume as a fact that it existed or had been exercised, was to assume the pivotal fact in issue, and was in such respect a clear invasion of the province of the jury.

For the error indicated the judgment is reversed and the cause remanded.

**Hannah M. Foster v. Alexander F. McKeown and  
William H. McKeown.**

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1. *PRACTICE—Recovery Under the Common Counts.*—When the terms of a special contract have been so far performed that nothing remains but a mere debt or duty to pay money, the amount due may be recovered under a general count.

2. *SAME—Recovery—Indebitatus Assumpsit.*—Where a contract has been fully executed on the part of the plaintiff, and nothing remains to be done under it but the payment of money, which payment it is the duty, under the contract, of the defendant to make, the plaintiff need not declare specially, and may recover under a count in *indebitatus assumpsit*.

3. *COMMON COUNTS—Recovery Under.*—Where the contract has been performed and nothing remains to be done but to pay the amount due under it, a recovery may be had under the common counts.

*Assumpsit.*—The common counts. Appeal from the Circuit Court of Cook County; the Hon. JOHN C. GARVER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed November 7, 1899.

E. A. ABORN, attorney for appellant.

FRANCIS T. MURPHY and THADDEUS S. ALLEE, attorneys for appellees; ROY O. WEST, of counsel.

MR. JUSTICE SHEPARD delivered the opinion of the court. This is a suit in *assumpsit* to recover for a balance claimed to be due under a special contract, and for a bill of extras for labor and material, in and about the erection of two dwelling-houses.

The declaration consists of the common counts. The pleas are the general issue, and set-off.

The plea of set-off is confined to damages claimed for a failure to complete the work within the time stipulated by the contract of the parties, and for some cash disbursements to third parties, of which latter there was, however, no evidence. We fail to observe any contention in appellant's brief of any error, in fact or in law, in respect of the

disallowance by the jury of all claims under the plea of set-off.

A recovery was had for the full amount claimed by appellees, including interest, amounting to \$994.80, and from such judgment this appeal comes.

The only question of importance raised by appellant, is involved in the proposition as to whether there can be a recovery upon the facts of the case, under a declaration consisting only of the common counts.

There was a contract in writing between the parties, covering the subject-matter. That contract contains various provisions relating to the doing of the work to the satisfaction of the architect named, the making of payments upon certificates of the architect, the manner in which the value of extra work, if any, shall be determined, and the time within which the contract shall be performed.

The contract price was \$4,150, and of that amount, all except \$150 was paid upon certificates issued therefor by the architect.

The architect gave no certificate for any part of what is claimed in the suit. Appellee makes no claim that the contract was not fully performed and the extra work and material done and furnished. It would seem, therefore, that the only question is whether appellant is right in her contention that because of the provisions of the contract, a special count was required.

It has been sententiously said by Mr. Justice Gary, that "however special the contract, not under seal, if the plaintiff has performed it and the defendant received under it the benefit for his own use, in general, some common count will suffice." *Zjednoczenie v. Sadecki*, 41 Ill. App. 329.

Again, in *Gottschalk v. Smith*, 54 Ill. App. 341, there is a quotation from *Chitty*, as follows:

"When the terms of a special contract have been so far performed that nothing remains but a mere debt or duty to pay money, then the amount due may be recovered under a general count."

The same rule was stated as long ago as *Lane v. Adams*, 19 Ill. 167, as follows:

“Where a contract has been fully executed on the part of the plaintiff, and nothing remains to be done under it but the payment of money, which payment it is the duty, under the contract, of the defendant to make, the plaintiff need not declare specially, and may recover in *indebitatus assumpsit*.”

The same rule was applied in *Neagle v. Herbert*, 73 Ill. App. 17, a case where, under a declaration consisting only of the common counts in *assumpsit*, a recovery was sustained “for work done and material furnished in pursuance of a contract between the parties, and for extra work.”

In the last cited case the contract was, as here, admitted in evidence for the purpose of showing its terms, and to measure the damages.

The distinction between the cases relied upon by appellant and the present one is that in them it appeared that the contract had not been performed by the plaintiff, there yet remaining something to be done by him before he would be entitled to the money, while here there is no such claim to be found in the evidence, nor in argument.

Thus in *Neagle v. Herbert*, *supra*, the statement (not unlike in effect what we have already said in fewer words) is made:

“It is not claimed by the attorney for plaintiff in error that defendant in error did not perform the work and furnish the material which, by his contract, he agreed to perform and furnish, nor that he did not do the extra work for which he claims compensation.” *Michaelis v. Wolf*, 136 Ill. 68, is relied upon.

That was a petition for a mechanic's lien where fraud and conspiracy between the architect and the owner were charged. It also appears from the opinion, “the building, in various respects, was not in conformity with the requirements of the contract.”

Whatever, if anything, was there said that seems to favor appellant's contention must be taken as applying to the particular circumstances there existing.

Especially it should not be held to change a rule always theretofore announced by the Supreme Court, and reiter-

ated in the later case of *Shepard v. Mills* (173 Ill. 223, 70 Ill. App. 72), where the very point was made that a recovery of a balance due upon a special contract containing numerous conditions, for a heating apparatus, could not be had without declaring specially upon the contract.

The court there says :

"The law is well settled that where the contract has been performed and nothing remains to be done but to pay the amount due under it, a recovery may be had under the common counts," and cites *Lane v. Adams*, *supra*, and other cases.

Especial reliance is placed by appellant upon *Vincent v. Stiles*, 77 Ill. App. 200.

That case followed *Michaelis v. Wolf*, *supra*, and was correctly decided upon the facts which the record on file in this court discloses. There the architect refused to issue a final certificate because he would not accept the work, it not having been properly done.

In this case there is no evidence that the final certificate was withheld for any reason except that the agent of appellant so requested. There is no claim, in the evidence or in the briefs, of the work being not done, or improperly done. Upon the other hand, the evidence is plenary that the work was done according to the contract, and that the extra work and material was done and furnished, and that as to both, the superintending architect expressly stated that appellees were entitled to a certificate, but its issuance had been forbidden by appellant's agent. Where an architect whose duty it is to issue a certificate refuses to do so, through no fault of the plaintiff, the latter is absolved from producing the architect's certificate as a condition precedent to bringing his suit. *Fowler v. Deakman*, 84 Ill. 130.

Under the circumstances of this case nothing remained to be done, except appellant's duty to pay the money.

The common counts were sufficient; there was no substantial error in respect of instructions or in the admission or rejection of evidence; and for all that appears, the judgment is right and should be affirmed.

Mr. Justice HORTON does not concur.

**Emerson Piano Co. v. Maund et al.**

1. **CONSTRUCTION OF CONTRACTS**—*When the Property is in the Vendor and Possession in the Vendee.*—When a vendor and vendee enter into an agreement by which the vendee is to pay for the property in specified installments, the possession of the property to be in vendee, but should remain the property of the vendor until such stipulated amounts should be paid, and with a provision that in case of default in making such payments, or an attempt by the vendee to dispose of or incumber the same, or if the vendor should feel insecure, etc., then the vendee should deliver back the property, and the vendor might retake the same, etc., is valid as between the parties, and enforceable except as against creditors of the vendee who acquire liens upon the same while in the vendee's possession.

2. **CHATTEL MORTGAGES**—*Can Not be Shown by Parol.*—The existence of a chattel mortgage lien can not be shown by parol evidence.

**Replevin.**—Trial in the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Verdict for defendant by direction of the court; appeal by plaintiff. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed November 7, 1899.

JOHN C. TRAINOR, attorney for appellant.

SAMUELS & SELIGMAN, attorneys for appellees.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The appellant brought suit in replevin, before a justice of the peace, to recover a piano from the appellees, and being defeated there, appealed to the Circuit Court with a like result.

The piano was taken, under the writ, from the possession of the appellee, Pauline L. Maund, by whom it was then held under a certain written agreement between herself and appellant, whereby Maund promised to pay to appellant four hundred and twenty-five dollars in specified installments, and wherein it was provided that the consideration for the payment of the specified amount was the agreement by appellant to sell and deliver to Maund the

particular piano, the use of which, it was stated in the contract, was temporarily let to Maund upon condition, among others, that the piano should remain the property of appellant until such stipulated amounts should be paid, and it was further provided that in case of default in making such payments, or an attempt by Maund to dispose of or incumber the piano, or if appellant should feel insecure, etc., then Maund would deliver back the piano, and appellant might retake the same, etc.

As between the parties to the writing, by whatsoever name it may be called, whether lease or otherwise, it was a good and valid contract, and enforceable, except as against creditors of Maund who should acquire a lien upon the piano while in her possession. *Murch v. Wright*, 46 Ill. 487; *People v. Kirkpatrick*, 69 Ill. App. 207; *Hallbeck v. Stewart*, 69 Ill. App. 225.

Some pretense of a chattel mortgage lien given by Maund to the appellee Schlesinger & Mayer, was attempted to be shown. The only evidence, however, that any such chattel mortgage existed, was the mere statement made by Maund to one or more of appellant's witnesses, that "Schlesinger & Mayer's men have been out here and taken a chattel mortgage on all of my things," and that "she didn't know till after she had given the mortgage that the piano was included in it." The existence of a chattel mortgage lien must, if at all, be shown by better evidence than is thus afforded.

The case, therefore, may be considered by us upon, only, the respective rights of appellant and the appellee Maund.

It is argued that no demand is shown to have been made for the return of the piano before replevin was begun, and hence, that the peremptory instruction to the jury to find for the defendants was right.

The evidence of a demand consists in the testimony of two of appellant's witnesses, and in the admission made by appellee's counsel. One of the witnesses, in response to the question (not objected to), "Did you ever make any demand upon Pauline Mound for this piano?" answered, "Yes, sir."



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Emerson Piano Co. v. Maund.

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That answer was followed by another question and answer, viz.:

“Q. When was it, and state the circumstances. A. The latter part of July, 1897. She called at our store in reference to a letter I wrote her, the way the payments had been going on. Our conversation was, she said she couldn't do any better, and I told her we would have to send for the piano, and she got very angry. I demanded that piano and sent a wagon with a written order for it. She did not deliver it. She refused to deliver it. They come back without the piano. It is the same piano involved in this suit.”

The other witness testified as follows:

“On the 26th I said if she didn't make the payments we would have to take the piano. I requested her to return the piano.

Q. You requested her to return the piano? A. I did.

Q. You asked her to return the piano to the house, if she couldn't pay for it? A. I told her if she didn't make her payments we would have to take the piano away from her. I didn't ask her to return the piano to the house.”

Further than this, appellant's counsel, in arguing before the trial judge upon the question of demand, said: “No demand was made on Schlesinger & Mayer before this suit; demand was made on Pauline Maund.” The testimony we have quoted being uncontradicted, and the admission by appellant's counsel being made as stated, constituted sufficient evidence of a demand to require that the question be submitted to the jury.

Either upon the theory that no sufficient demand was shown, or for some other reason not disclosed by the record, the court instructed the jury peremptorily at the close of appellant's case, to find the issues for the defendants and the right of property in them, and upon the verdict, as returned, judgment was entered.

We think it was manifest error to take the case from the jury.

The point is made that the judgment must be reversed because the verdict and judgment are bad for uncertainty, in that the right to the possession of the property is found to be in the “defendant,” there being more than one.

We omit discussion of the question, it not being likely to arise upon another trial, and the judgment having to be reversed for the other reasons stated. Reversed and remanded.

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**Francis Hutchison, sued as Frank Hutchinson, v. Moore Bros. Furniture Co.**

1. PRACTICE—*Motion for New Trial if in Writing.*—If a party moving for a new trial does so in writing, he should file his points in writing, particularly specifying the grounds of such motion. (Rev. Stat., Ch. 110, Sec. 57.) Where this is not done, the court is not advised as to any alleged mistakes or error claimed to exist.

Appeal from the Superior Court of Cook County; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1899. Affirmed. Opinion filed November 7, 1899.

JAMES F. HUTCHISON, attorney for appellant.

MEYER S. EMRICH, attorney for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

In this case appellant filed a motion in writing to set aside the verdict and to grant a new trial. The motion does not state, or assume to state, any point or reason why it should be allowed.

If a party moving for a new trial does so in writing, he should "file the points in writing, particularly specifying the grounds for such motion." (Rev. Stat. Ch. 110, Sec. 57.) The motion filed in this case does not advise the court as to any alleged mistake or error claimed to exist, and is not sufficient.

It may not be improper to add that in this case we are unable from the abstract and the so-called briefs to ascertain the points as to which it is contended the trial court erred. For that reason, also, the judgment of the trial court is affirmed.

## Tobias H. Wetzel v. Pierre Meranger.

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1. **LEASE—Landlord's Right to Take Possession upon Default in Payment of Rent.**—A landlord has a right, under proper conditions of a lease authorizing such a proceeding, to terminate a lease, take possession of the premises, exclude the tenant therefrom, and to remove his goods, using reasonable care in so doing.

2. **REASONABLE CARE—In Removing Goods—A Question for the Jury.**—In removing a tenant's goods and taking possession of the demised premises it is for the jury to say, under all the evidence, whether, considering the nature of the goods removed, reasonable care for their safety and preservation was exercised by the landlord:

3. **EXCESSIVE DAMAGES—Want of Reasonable Care in Removing a Tenant's Goods.**—Where the goods removed by a landlord in taking possession of leased premises consisted of a small lot of French sausage and meats, head-cheese and various kinds of "*delicatessen*," dishes, furniture, etc., but that for some cause, presumably rain, much of it was rendered valueless during the time it remained outside, a verdict for \$350 is excessive.

4. **VERDICTS—When to be Set Aside.**—Sometimes verdicts will be set aside where the trial was not such as the law contemplates, even though technical error has not occurred.

5. **ATTORNEYS—Improper Remarks of.**—Although an objection is sustained to unwarranted remarks of counsel in his closing argument to the jury, and they are withdrawn, their effect had been produced upon the jury and remains with them. Counsel may not thus violate all proper rules to be observed in arguments to the jury and escape the consequences.

**Trespass, quare clausum fregit, and de bonis asportatis.** Trial in the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed in case of remittitur, otherwise reversed and remanded. Opinion filed November 7, 1899.

L. A. GILMORE and ROSWELL SHINN, attorneys for appellant.

THEO. PROULX and CYRUS J. WOOD, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The final declaration under which the parties seem to have gone to trial, alleged in one of its counts as a cause of

action the false arrest and imprisonment of the appellee by the appellant, and in another count, trespass *quare clausum fregit* and *de bonis asportatis* was laid.

There were no special pleas filed, but it was stipulated that the defendant might, under his general plea of not guilty, offer any evidence in defense, justification, license or excuse as fully as though the same had been specially pleaded; and it was further stipulated that, prior to the commencement of this suit, the defendant (appellant) swore out a warrant against the plaintiff (appellee), charging the plaintiff with disorderly conduct under a city ordinance, and that such suit was dismissed for want of prosecution.

It is disclosed by the record that at the time of the arrest of the plaintiff upon the warrant referred to, and for a month or more prior thereto, the plaintiff was a tenant of the defendant, under a written lease, of a certain store on South Clark street in Chicago; that because of default in the payment of rent, the parties, on the day prior to the arrest, had a quarrel, in the course of which threats were used by the plaintiff against the defendant, and that because thereof, and of quarrels and fighting between the plaintiff and his wife, on previous occasions, the defendant procured the warrant for plaintiff's arrest to issue on the following day; that during the time the plaintiff was held under arrest by virtue of such warrant, the defendant entered the leased premises and removed the plaintiff's goods to the sidewalk in front of the store, where they remained from about half after ten o'clock in the forenoon until six o'clock in the evening of the same day, and that thereafter the defendant kept possession of the store.

The jury returned a verdict in favor of the plaintiff for three hundred and fifty dollars, upon which judgment was entered.

The evidence under the false imprisonment count effectually defeated the appellee's right to a recovery thereunder, and, indeed, we do not observe any serious claim by appellee in his brief, to the contrary. It is, therefore, only necessary to discuss the other questions in the case.

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Wetzel v. Meranger.

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While it would seem to be clear that appellant had the lawful right under the terms of the lease, upon default in the payment of rent, to terminate the lease and take possession of the premises, and exclude the appellee therefrom, and to remove his goods with reasonable care, still it was for the jury to say under all the evidence, whether, considering the nature of the goods that were removed, reasonable care for their safety and preservation was exercised by the defendant. The goods removed consisted of a small lot of French sausage and meats, head cheese and various kinds of "delicatessen," dishes, furniture, etc. It was manifestly a perishable stock of goods, and it is not disputed, but that for some cause—probably rain, in part—much of it was rendered valueless during the time it remained on the sidewalk. Whether this was the fault of the appellant, or of appellee, it is not our province to say.

But as to the amount of damages sustained by appellee, the jury most clearly went astray. It is impossible to sustain the verdict in its full amount.

We have carefully examined all that the record contains upon that question, and can see no reasonable basis to believe that the damages suffered by appellee amounted to any near approximation of the amount of the verdict. Probably it was induced in part by the circumstances that appellant removed the goods during the time the appellee was under arrest, and in part by the wholly unwarranted remarks of counsel for appellee in his closing argument to the jury. The bill of exceptions brings before us such remarks, and although the court sustained an objection to them, and they were withdrawn by appellee's counsel, their effect had been produced upon the jury and remained with them. Counsel may not thus violate all proper rules to be observed in arguments to the jury, and escape the consequences.

Sometimes, verdicts will be set aside where the trial was not such as the law, in its broad aspects, contemplates, even though technical error has not occurred. *West Chicago St. R. R. Co. v. Johnson*, 69 Ill. App. 147.

Our disposition would be to reverse the judgment because, solely, of the remarks of counsel; but, perhaps, considering all the circumstances of the case, a nearer approximation to justice will be attained if we give an opportunity to appellee to remit from the judgment such an amount as seems to us to be clearly excessive.

The order, therefore, is, that if appellee shall, within ten days, file in this court a remittitur of one hundred and fifty dollars from the judgment appealed from, it will be affirmed for the balance at appellee's costs—otherwise the judgment will be reversed and the cause remanded. Affirmed in case of remittitur, otherwise reversed and remanded.

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**Annie M. Graham v. Michael J. Graham, Edward S. Graham, John I. Graham and Graham Bros. Mfg. Co.**

1. CHANCERY PRACTICE—*General Demurrer Erroneously Sustained.*—Where a person is a proper but not a necessary party under the allegations of the bill, it is error to sustain a general demurrer to the bill for that reason.

2. TRUSTS—*Resulting Trusts.*—Where a person, having a fiduciary character, purchases property with the fiduciary funds in his hands and takes the title in his own name, a trust in the property will result to the *cestui que trust*, or other person entitled to the beneficiary interest in such fund.

3. SAME—*Purchase by Executors or Administrators.*—If an executor or administrator purchase property in his own name with money belonging to the estate, a trust in the property will result to the heirs, legatees or other persons entitled to the beneficial interest in the estate.

4. SAME—*Investment of Trust Funds—Breaches of Trusts.*—The investment of a trust fund when invested and claimed as the individual property of the trustee or agent, is to be treated as a breach of trust; and the *cestui que trust* can either follow the fund and claim that in which it has been invested, or hold the trustee or agent personally responsible.

5. SAME—*Trust Property May Be Followed.*—The trust property may be followed in equity by the *cestui que trust* into whosoever hands it may come with notice of the trust.

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Graham v. Graham.

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**Bill for Accounting.**—Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded with directions. Opinion filed November 2, 1899.

YOUNG, MAKEEL, BRADLEY & FRANK, attorneys for appellant.

ROBLIN, HASTINGS & SICKLESTEEL, attorneys for appellees.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellant filed her bill in the Circuit Court of Cook County for an accounting as to certain trust estate which it is alleged came into the hands of appellees, and of which she was the beneficiary, and asking a decree declaring that it was held by the appellee Graham Bros. Mfg. Co. in trust for her, or in case it should be found that she was not entitled to that relief, then that appellees be each ordered to pay her the principal of the trust estate with interest, and that the court decree to her a first lien on the assets of the appellee corporation therefor. The chancellor sustained a general demurrer to the bill and dismissed it for want of equity at her costs, from which decree this appeal is taken.

The bill shows that Thomas O'Neil, appellant's father, died leaving his will, which was probated May 13, 1892, and letters testamentary thereon were issued to one Richard Coyne and the appellee John I. Graham, being two of the three executors and trustees named in the will, the third failing to qualify; that said Graham, the other executor consenting thereto, took the exclusive control, management and custody of the decedent's estate, a certain portion of the increase of which by the will was devised to appellant, with remainder over to certain of testator's children, in equal shares, including appellant, upon the death of his widow; that appellant's share in the estate was \$1,720.88, which came to said John I. Graham's hands from time to time in the years 1895 and 1896 up to May 2, 1896; that said John I. Graham, at the instigation of appellee

Michael J. Graham, from time to time during 1895 and the early part of 1896, took from the funds of said trust estate large amounts of money (specifying the same) and invested it in the business of manufacturing and sale of gas and electric light fixtures and machinery, carried on by them under the name of Graham Bros.; that afterward appellee Edward S. Graham, knowing that said trust estate was invested in the business of Graham Bros., purchased a one-third interest in the firm, and the three thereafter carried on the business until December 22, 1897, when the appellee corporation, Graham Bros. Mfg. Co. was organized, the said three Grahams being the incorporators and taking all the stock of \$12,000 in equal shares; that the property and business of the firm of Graham Bros. was transferred to the corporation and was treated as equivalent in value to the capital stock of the corporation; that appellees Michael J. Graham and Edward S. Graham, having two-thirds of the capital stock of the corporation, though they contributed nothing to the capital of the firm or corporation, are in control and possession of its business and assets to the practical exclusion of John I. Graham; that John I. Graham and Richard Coyne, as executors of said estate of Thomas O'Neil, on April 13, 1896, made their account, which was settled by order of the Probate Court on June 2, 1896, and shows then in their hands as executors \$9,313.03, which was, by order of the Probate Court, allowed to stand in their hands as trustees under said will; that on May 1, 1896, a further sum of \$1,125 belonging to said trust estate came to the hands of John I. Graham as trustee; that the firm of Graham Bros. refunded to John I. Graham all of said trust estate invested in said business except \$1,965.45, which is now invested in the business and assets of said corporation; that John I. Graham has settled with and paid all the other beneficiaries under said will but appellant, to whom he has paid nothing.

It is said in argument for appellant that the learned chancellor sustained the demurrer for two reasons : First, because John I. Graham did not hold the fund as trustee, but as



executor; and, second, because Richard Coyne was not made a party to the bill.

Appellee's counsel in their brief do not consider the second point, and we therefore presume that they deem it insufficient to sustain the decree dismissing the bill. Technically Coyne was a proper, though we think not a necessary party, under the allegations of the bill, from which it appears that none of the trust estate actually came to his hands. No relief being asked as against him, we are of opinion a general demurrer to the bill should not have been sustained to it for that reason. If the chancellor thought he was a necessary party he should have ordered that he be made such and brought in by process.

We are of opinion that the first reason assigned for supporting the decree is not tenable. We think it clearly apparent from the bill that there was a trust created by the will of Thomas O'Neil, of which appellant was one of the beneficiaries; that John I. Graham, one of the trustees, who had the exclusive control and custody of the trust estate, invested it in the firm business of Graham Bros., which was afterward changed to the corporation, and that the latter still has appellant's share of the trust estate invested in its business, to the knowledge, if not at the instigation or connivance, of all its officers and stockholders. These facts present a case for the interposition of a court of chancery, and it is immaterial whether Graham held the fund as executor or as trustee. The relation, whether one or the other, is a trust relation, and is a peculiar subject of equity cognizance. Besides, the Probate Court ordered that the fund stand in his hands as trustee under the will, except \$1,125, which he received after the settlement of his account with the Probate Court.

In Perry on Trusts the learned author says (Sec. 127):

"If a person having a fiduciary character purchase property with the fiduciary funds in his hands, and take the title in his own name, a trust in the property will result to the *cestui que trust*, or other person entitled to the beneficiary interest in the fund with which the property was paid for."

\* \* \* "If an executor or administrator purchase property in his own name with money belonging to the estate, a trust in the property will result to the heirs, legatees or other persons entitled to the beneficial interest in the estate."

To same effect in principle is 1 Pomeroy's Eq. Juris., Secs. 422, 587; 2 Id., Secs. 1051 and 1058.

In *Seaman v. Cook*, 14 Ill. 501-4, it was held that the investment of a trust fund is, when "invested and claimed as the sole property of the trustee or agent, to be treated as a breach of trust; the *cestui que trust* can either follow it and claim that into which it has been invested, or hold the trustee personally responsible."

The same principle is announced in *Tyler v. Daniel*, 63 Ill. 316; *Ward v. Armstrong*, 84 Ill. 151-4; *Stephenson v. McClintock*, 141 Ill. 604-13.

The trust property may be followed in equity by the *cestui que trust* into whosoever hands it may come with notice of the trust. 2 Perry on Trusts, Sec. 828; 2 Pomeroy's Eq. Juris., Secs. 1043 and 1058; *N. M. L. Ins. Co. v. Spaid*, 99 Ill. 264; *Allen v. Russell*, 78 Ky. 105-12; *Bundy v. Town of Monticello*, 84 Ind. 129.

We are of opinion the bill presents a right to equitable relief, and therefore the decree dismissing it is reversed and the cause remanded, with directions to overrule the demurrer and for further proceedings consistent with the views herein expressed. Reversed and remanded with directions.

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### Best Brewing Co. v. Kunigunda Klassen.

1. CONSTRUCTION OF CONTRACTS—*Suretyship—Explanation of Ambiguities.*—There is no rule exclusively applying to contracts of suretyship requiring them to be, in all cases, interpreted with stringency and critical acumen against a creditor, all ambiguities to be resolved to the advantage of the surety, and every liability excluded that can by strained construction be deemed outside of the agreement. If the terms are ambiguous, the ambiguity may be explained by the circumstances surrounding the parties, and if the surety has left anything

ambiguous in his expressions, the ambiguity is to be taken most strongly against him.

2. **APPEAL BONDS—*Forcible Entry and Detainer—Identification.***—An appeal bond in an action of forcible entry and detainer given in order to perfect an appeal of the case to the County Court, although containing no description of the premises for the restitution of which judgment was rendered, sufficiently identifies the premises in question with those referred to, if the bond is filed in the same case, and recites that it was given to perfect an appeal of the identical case, to the County Court.

3. **PRACTICE—*Appeal from Judgment of Justices.***—In cases of appeal from judgments of justices of the peace, trials in the Circuit and County Courts are to be *de novo*, upon such evidence as the parties may produce, and the appellee has the right under Section 181, Chapter 79, R. S., to elect whether the appeal shall be dismissed, or have judgment for the amount of the recovery appealed from.

4. **WORDS AND PHRASES—*The Word "Affirm" Defined.***—According to the Century Dictionary the word "affirm" is defined as meaning "to make firm, establish, confirm or ratify." The condition of the bond requiring that the judgment appealed from shall be "affirmed" is satisfied by a judgment which is in effect an affirmance.

5. **CONTRACTS—*Of Voluntary Obligation.***—The rule of construction of contracts of voluntary obligation, whether as to sureties or principals, is to give that meaning and interpretation to the words used in the light of the whole instrument, together with any side light in case of ambiguity, as will carry out the evident intent of the parties thereto.

6. **STATUTORY BONDS—*To Be Liberally Construed.***—Statutory bonds taken by court officers will be liberally construed, and the intention must be attributed to the obligors, of entering into an obligation every provision of which would be valid.

7. **CORPORATIONS—*As Sureties on Appeal Bonds—Ultra Vires.***—A corporation formed for "the manufacture and sale of beer, ale and porter, and the carrying on of a general brewing business in all its branches," has power under its charter to sign a bond in pursuance of its legitimate business of manufacturing and selling its product.

8. **ULTRA VIRES—*Executed Contracts.***—While a contract, *ultra vires* remains executory, courts will interfere to prevent its enforcement, or on the application of a shareholder or other authorized persons, prevent its execution; but when it has been carried into effect, and the corporation has received the benefit of it, it can not plead the excess of its power in discharge of its liability.

9. **ESTOPPEL—*Corporations—Ultra Vires.***—Whether a corporation is estopped to raise the question that a contract was *ultra vires* because it has received the benefit of it, depends upon the sense in which the term "*ultra vires*" is used; in the more legitimate use of the term, it applies only to acts which are beyond the purpose of the corporation, which could not be sanctioned by the stockholders.

10. *SAME—Corporations—Ultra Vires.*—A brewing company having signed an appeal bond as surety in order to protect and retain a customer and increase the sale of its manufactured product, which by its charter it is authorized to manufacture and sell, the purpose was within its corporate powers; and though the act was an abuse of a general power, yet having received the benefit, the corporation is estopped from asserting that its act was *ultra vires*, because the power was improperly exercised.

**Debt, upon an appeal bond.** Trial in the Circuit Court of Cook County, on appeal from a justice of the peace; the Hon. ELBRIDGE HANEY, Judge, presiding. Judgment for plaintiff; appeal by defendant. Heard in this court at the March term, 1899. Affirmed. Mr. Justice HORTON, dissenting. Opinion filed November 7, 1899. Rehearing denied.

**Statement.**—This is an action of debt brought by appellee against appellant and one Ruel G. Rounds, upon an appeal bond given in a forcible entry and detainer case. Appellee recovered judgment before a police magistrate for possession of certain premises against Rounds, a saloon keeper, and a customer of the appellant. Rounds appealed to the County Court and judgment in favor of appellee and for restitution of the premises, was rendered there also.

The appeal bond taken by the police magistrate was for \$2,000, and the condition is that if Rounds shall prosecute his appeal to the County Court with effect, and pay all rent due or to become due before the final termination of the suit, with such damages and loss as may be sustained by appellee, with costs, until restitution, "in case the judgment from which the appeal is taken is affirmed," then the obligation to be void, otherwise to remain in force.

The bond recites that Rounds and the Best Brewing Company of Chicago (appellant,) are held and firmly bound unto appellee. It is signed by Rounds, and appellant's execution of it is as follows:

"THE BEST BREWING CO. OF CHICAGO, [SEAL]  
by Chas. Hasterlik, its Pres. [SEAL]"

BLUM & BLUM, attorneys for appellant.

F. L. SALISBURY, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

The appeal bond sued upon in this case did not contain any description of the premises, for restitution whereof the judgment before the justice was rendered. It recites that appellee did, on the 14th of August, 1898, "recover a judgment against the above bounden Ruel G. Rounds, in an action for forcible entry and detainer of certain premises in said Cook county, and for restitution thereof," before T. L. Humphreville, Esq., a police magistrate.

Appellee introduced in evidence at the trial a certified copy of the order of judgment of the County Court in the case of Klassen v. Rounds, which does describe the premises for restitution of which judgment was there rendered. The certificate of the clerk identifies the case as of the same number as that in which the appeal bond now in controversy was filed. Upon this evidence the certified copy of the order was admitted over the objection of appellant. We think there was sufficient evidence to identify the premises, for restitution of which judgment was entered in the County Court, with the premises referred to in the bond. The latter was filed in the same case, and recites upon its face that it is the bond given in order to perfect the appeal of that identical case to the County Court. There is here no variance in the bond from the record. Nor is there any failure to comply with the requirement of the statute, which provides the condition of the bond shall be in this respect, that the obligor pay the damages and loss the plaintiff may sustain "by reason of the withholding of the premises in controversy." In *Belloni v. Freeborn*, 63 N. Y. 333, it was said that there is no rule exclusively applying to instruments of suretyship and requiring them to be in all cases interpreted with stringency and critical acumen against the creditor, and all ambiguities to be resolved to the advantage of the promisor, and every liability excluded that can by strained and refined construction be deemed outside of the agreement. If the terms are ambiguous, the ambiguity may be explained by the circumstances surrounding the parties, "and if the surety has left anything ambiguous in his expressions, the ambiguity be taken most strongly against

him. This certainly should be the rule to the extent that the creditor has in good faith acted upon and given credit to the supposed intent of the surety;" and "in such instruments the meaning of the written language is to be ascertained in the same manner and by the same rules as in other instruments."

It is further contended that there can be no recovery because the judgment was not "affirmed," as required by the condition of the bond. It is said in support of this contention that the judgment in the County Court upon the appeal from the justice is an original judgment and affirms nothing.

In cases of appeal from judgments of justices of the peace, it has been held under the statute then in force that trials in the Circuit and County Courts\* shall be *de novo*, upon evidence the parties may adduce, (*Shook v. Thomas*, 21 Ill. 87-89,) and such is still the practice. By that statute, the appellee had the right, under certain circumstances, to elect whether the appeal should be dismissed or he should have judgment for the amount of the judgment appealed from. *Fergus v. Haupt*, 54 Ill. App. 190; Rev. Stat., Chap. 79, Sec. 181.

According to the Century Dictionary the word affirm is defined as meaning, "to make firm, establish, confirm, or ratify, as, the Appellate Court affirmed the judgment." The judgment of the County Court had that effect. The rule of construction of contracts of voluntary obligation, whether as to sureties or principals, is to give that meaning and interpretation to the words used in the light of the whole instrument, together with any side light in case of ambiguity, as will carry out the evident intent and meaning of the parties thereto. *Hotz v. Bollman Bros. Co.*, 47 Ill. App. 378-382. In that case it is also said that "statutory bonds taken by court officers will be liberally construed." In *Shreffler v. Nadelhoffer*, 133 Ill. 536, on pp. 552 and 555, it was said that the intention must be attributed to the obligors of entering into an obligation, every provision of which would be valid. In *Beckman v. Kreamer*, 43 Ill. 447-449, the judgment of the justice of the peace had not been technically affirmed in part as the statute

required, the case having been tried *de novo* in the Circuit Court, but the Supreme Court sustained the judgment. The language of the statute, providing (Chap. 57, Sec. 19) for an appeal bond in cases of forcible entry and detainer, is that it shall be conditioned, "in case the judgment from which the appeal is taken is affirmed, or appeal dismissed." A dismissal of the appeal would be a virtual affirmance. *Young v. Mason*, 3 Gil. 55-58. The word affirmed, as used in the statute, must have a broader meaning. In the case before us the condition of the bond sued on is in the statutory words, requiring that the judgment shall be affirmed. But when the case is tried *de novo*, as appeals from justices of the peace to the County Court have, as we have seen, been required to be, the judgment is not required to be a mere repetition of the judgment appealed from. The court has been required by statute (Rev. St., Chap. 79, Sec. 182) "to hear and determine the same in a summary way, according to the justice of the case, without pleading in writing." In such trials exceptions to proceedings before the justice are by that statute prohibited, and no judgment can be properly said to be, in the strictest sense, an affirmance where the proceedings appealed from are not under review. We think the word "affirmed," as used in the statute and in the bond, must be given a broader meaning, and that the condition was satisfied by the judgment rendered in the County Court, which was in effect an affirmance of the judgment appealed from.

The correctness of this conclusion in the present case is apparent from an inspection of the record, which shows the judgment to have been for restitution of the premises sued for before the justice, with costs. It is literally an affirmance or confirmation of the judgment of the police magistrate appealed from.

It is contended that the bond sued upon is not the bond of appellant, because the latter had no authority under its charter to execute such a bond as surety, and because its president had no authority to so bind the corporation.

It is doubtless true, as contended by appellant, that the

appellant corporation has no powers other than those conferred by its charter, and such incidental powers as are necessary to carry into effect those specifically conferred. *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24. The charter of appellant states the object for which it is formed to be "the manufacture and sale of all kinds of beer, ale and porter, and the carrying on of a general brewing business in all its branches."

We think it fairly appears from the evidence that the appellant was selling beer to Rounds while he was in possession of the premises to enable him to retain which the bond here in controversy was executed. It furnished him beer both before and after the bond in question was executed. It would be a violent presumption to assume that it gave him the beer when its business was to sell it. The sale of beer is one of the objects for which the corporation was organized, and is therefore expressly within its corporate powers. The power to sell carries with it the power to employ all regular and legitimate means of obtaining and retaining customers. It was reasonable to suppose that if the appellee had obtained possession of the premises upon the judgment rendered in his favor by the police magistrate, and Rounds had been ousted from possession of the saloon, he would have ceased to buy beer of appellant, and the latter would have lost a customer. If the appellant, by its authorized agents, actually believed that Rounds was entitled to remain in possession under his lease, and that the judgment dispossessing him was wrong, then it may, with much show of reason at least, be contended that signing the bond as surety in order to enable him to continue his business, was an effort to protect a customer and promote the sale of the company's product; in other words, to do that which the appellant is by its charter expressly authorized to do. Under such circumstances the case may be said to come within the reasoning of the Supreme Court in *B. S. Green Co. v. Blodgett*, 159 Ill. 174. There the corporation was organized under the general laws of the State for the purpose of manufacturing and



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dealing in saddlery, hardware, leather, shoe findings and vehicles. It subscribed \$1,000 toward the purchase of a site for the location of a postoffice. It was held that the location of the postoffice, adjoining the place of business of the company, would be of direct financial and business advantage, would be likely to increase the number of its customers and the amount of its sales, and consequently add to its gains and profits; that the subscription was a reasonable exercise of the power possessed by the officers of the company, and the latter was held liable. In the present case there can be no doubt of the power of the officers of the appellant company to make any legitimate effort, and employ all honorable and lawful means of retaining customers. It is contended, not that the company had no power to do this, but that the means it employed are beyond its corporate power.

The contract in the case at bar is not executory, it is executed; and appellant has had the benefit of it in retaining its customer, to whom, as appears by the evidence, it continued to furnish beer after the bond in controversy was executed, enabling the customer to retain possession of the premises. In *Kadish v. G. C. E. L. & B. Ass'n*, 151 Ill. 531-538, it is said:

"While a contract *ultra vires* remains executory, courts will interfere to prevent its enforcement, or on the application of a shareholder or other authorized person, prevent its execution; but when it has been carried into effect, and the corporation has received the benefit of it, it can not plead the excess of its power in discharge of its liability."

In the case of *Heims Brewing Company v. Flannery*, 137 Ill. 309, it is said:

"The purpose of the defendant (Brewing Company) in entering into said contract \* \* \* was to increase the sale and consumption of beer of its own manufacture. This was sought to be accomplished first by getting control of the premises where the plaintiffs had established and were carrying on a large saloon business, and secondly, by obtaining from the plaintiffs a contract not to engage in the saloon business themselves, nor allow that business to be carried on in that locality on premises owned

or controlled by them." *It was held that* "the defense of *ultra vires* can not avail the defendant. Even admitting that entering into said contract was in excess of the defendant's corporate powers, yet having entered into said contract and enjoyed its benefits, it should be estopped to appeal to the limitations imposed by its charter for the purpose of escaping payment of the stipulated consideration."

Not only does it appear that appellant in the case before us was benefited in retaining its customer by its execution of the bond in question, but a positive injury and loss was thereby inflicted upon the appellee. The appeal bond was taken by the police magistrate on or about August 17, 1894, and it was not until October 26, 1895, that appellee obtained, by the judgment of the County Court on the appealed case, a writ of restitution of the premises of which she had been, by the act of the appellant company, wrongfully deprived for more than fourteen months.

In the case *National Home Building and Loan Association v. Home Savings Bank*, 181 Ill. 35, it is said that whether a corporation is estopped to raise the question that a contract was *ultra vires* because it had received the benefit of it, depends upon the sense in which *ultra vires* is used; that "in the more proper and legitimate use of the term, it applies only to acts which are beyond the purpose of the corporation, which could not be sanctioned by the stockholders."

The purpose in executing the bond by appellant was not, in the case at bar, beyond the purpose of the corporation. That purpose was solely, so far as appears, precisely what it is said to have been in the *Flannery* case, "to increase the sale and consumption of beer of its own manufacture." This purpose was within its corporate powers, and could be sanctioned by its stockholders. The method of executing the purpose can doubtless be questioned. But the power to sign a contract, a note or a bond in pursuance of its legitimate business of buying material, manufacturing and selling its product, exists under appellant's charter. The method used to promote the sale of its product in the present instance by executing an appeal bond to retain a cus-

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tomor may have been an improper exercise of the power. In the case of National Home Building Ass'n v. Bank, above referred to, the Supreme Court quotes approvingly what is said in Durkee v. The People, 155 Ill. 354, and points out the clear distinction between the exercise by a corporation of a power not conferred upon it, and the abuse of a general power. We regard the act of the appellant in executing the appeal bond here in controversy for the purpose of retaining a customer and promoting the sale of its product, as coming under the latter head, the abuse of a general power; and therefore within the line of decisions referred to in the case last above mentioned (Durkee v. The People), where a corporation is estopped from asserting that a contract is *ultra vires* when it has received a benefit under the contract, where the making of the contract is within the scope of the franchise, but the power was improperly exercised. The judgment of the Circuit Court must be affirmed.

MR. PRESIDING JUSTICE HORTON.

I must dissent in this case. I can not concur either in the conclusion, or in a considerable portion of the argument. In my opinion there is not sufficient testimony upon which to base the assumption that the appellant was pecuniarily interested in, or derived any benefit from, the appeal in the case where the appeal bond sued upon was given.

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1. MORTGAGES—*When Absolute Deeds Are.*—Every deed conveying real estate, absolute in form, but appearing to have been intended as a security in the nature of a mortgage, is to be considered as a mortgage. (R. S. Ch. 95, Sec. 12.)

2. SAME—*When Deeds Will be Held to be Mortgages.*—Where it clearly appears from the evidence that the parties to a deed, absolute in form, have intended that it should operate as a mortgage only, to secure a debt, the courts should hold it to be in effect a mortgage.

3. DEEDS—*Construction of.*—A deed absolute in its terms should not be given a different effect, unless the evidence to warrant it, is clear and satisfactory.

4. *SAME—Inadequacy of Consideration.*—Inadequacy of price is not alone good for holding a deed to be a mortgage. But where no consideration whatever moves to the grantor, except money advanced to be expended upon the land, it is a fact tending very strongly to show that there was no sale.

5. *QUESTION OF FACT—Whether a Deed or Mortgage.*—The question as to whether an instrument is a deed or mortgage is one of fact, to be determined from the evidence in the case.

6. *EVIDENCE—Whether a Deed or a Mortgage.*—The facts that negotiations for a loan were pending when the deed was made, and that the grantee retained possession of the premises, and of inadequacy of consideration, are matters to be considered in determining the question as to whether an instrument is a deed or a mortgage.

7. *EQUITY—The Question in Cases of Doubt.*—In case of doubt existing from all the surrounding circumstances, a court of equity will lean to the holding that it is a mortgage rather than a sale.

**Bill to Have a Warranty Deed Declared a Mortgage.**—Appeal from the Circuit Court of Cook County; the Hon. JOHN C. GARVER, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed November 16, 1899.

**Statement.**—Appellant filed her bill in chancery against appellee, alleging, among other things, that on September 4, 1897, appellant was indebted to appellee in the sum of \$500, and to secure the payment thereof executed an absolute deed of conveyance, of that date, to appellee, of the premises described in her bill; that said deed, although appearing to be absolute on its face, was not intended to be such by the parties thereto, but that it was understood and agreed between them that the premises were to be held by appellee simply as security for the payment of said sum and interest; and that upon the payment by appellant of that sum, and interest, to appellee, he would reconvey the premises to appellant.

Appellee filed his answer to said bill, in which he admits that complainant conveyed to him, in fee simple, by absolute warranty deed, the premises in question, but denies that appellant was indebted to him in said sum of \$500, or any other sum; denies that said deed was given as security, or as a mortgage, and denies that said warranty deed was not intended to be such by appellant; and, on the contrary,

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avers that said deed was intended and understood by appellant and appellee to be an absolute conveyance of said property to appellee. A replication was filed to this answer.

The question presented by the pleadings was whether or not the deed of conveyance from appellant to appellee was intended as an absolute conveyance, or merely a mortgage to secure a debt.

The evidence discloses that prior to September 4, 1897, appellant owned the premises in question, consisting of 100 feet of land and a small cottage; that the property was incumbered by a first mortgage for \$2,500, and a second mortgage for \$249.33, and that there were several special assessments due, amounting to about \$250. The mortgage indebtedness was about to become due. Appellant was anxious to obtain a new and larger loan, to enable her to pay off all these various indebtednesses. To that end she applied through her agent, E. A. Birch, to the agents for the first mortgage. They refused to renew their loan of \$2,500 for the increased amount, viz., \$3,000, but were willing to renew it for \$2,500. She then sought a loan of \$500 upon a second mortgage, with which she might pay off the second mortgage of \$249.23 and the \$250 of assessments. Birch, her agent, took her to appellee, who had at some time sustained the relation of a business partner to Birch. As to what occurred between appellant and appellee, in the transactions following upon the application for a loan of \$500, is a matter of conflict in the evidence. Birch has since died. Appellant tells one story and appellee another. Neither is corroborated, except by the facts and circumstances of and following the transaction.

A warranty deed, absolute in form, was made by appellant to appellee, conveying the land, subject to the \$2,500 and the \$249.23 mortgages, and also subject to all taxes of 1897 and thereafter. The expressed condition of the deed was \$3,250. No money was paid by appellee to appellant, save \$500, which was delivered to her agent, Birch, and expended largely upon the property conveyed. Appellee

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testified that the money was expended as follows: \$125 paid upon first mortgage; \$260.48 paid upon taxes; \$15 paid upon second loan; \$99.52 paid as commissions on extension of loan. Of the money paid for taxes, all except \$65.26 was paid for taxes upon the property in question. The first mortgage was extended. It was arranged to extend the second mortgage of \$249.23 for one year. At the time of the execution of the warranty deed there were also executed the following other instruments:

“CHICAGO, ILLINOIS, Sept. 1, 1897.

J. C. BENNETT:

Please pay the proceeds of the sale of my lots ten and eleven, Hardin's addition to Evanston, Illinois, to Mr. E. A. Birch's order, and his order and receipt shall be of the same force and effect as my own, he being my agent in this matter.

CAROLINE RUBO.”

“This memorandum witnesseth, that Caroline Rubo, a widow, hereby agrees to purchase at the price of thirty-seven hundred and fifty (3,750) dollars, the following described real estate, situated in the county of Cook and State of Illinois: All of lots ten (10) and eleven (11), block two (2), in Harding's addition to Evanston, in Cook county, Illinois, section 19, township 41 north, range 14, east of the third principal meridian, and J. C. Bennett agrees to sell said premises at said price, and to convey or have conveyed to said purchaser a good and merchantable title thereto, by general warranty deed, as he shall then have, but subject to (1) existing leases, and all leases then thereon, the purchaser to be entitled to the rents from final payment hereon; (2) all taxes and assessments levied after the year 1890; (3) any unpaid special taxes or assessments; it being the intention of the parties hereto to give Caroline Rubo an option of purchase, she having sold and conveyed the above property absolutely to J. C. Bennett, and hereby acknowledges payment in full therefor.

“Said purchaser has paid nothing (000,000) dollars as earnest money, to be applied on such purchase when consummated, and agrees to pay . . . . ., or accepted by him, the sum of one thousand (\$1,000) dollars at the office of J. C. Bennett, Chicago, Ill., on or before one year from date, provided a good and sufficient general warranty deed conveying to said purchaser a good and merchantable title to said premises (subject as aforesaid) shall then be ready

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for delivery. The balance to be paid as follows: By assuming two trust deeds now an incumbrance on said lots, amounting to \$2,749.27, together with the interest thereon from date, as per these terms, and if paid by J. C. Bennett, or for him, then whatever is paid shall be added to the \$1,000 with seven per cent interest thereon, with interest from the date thereof at the rate of seven per cent per annum.

"Should said purchaser fail to perform this contract promptly on her part, at the time and in the manner herein specified, the earnest money paid as above shall, at the option of the vendor, be forfeited as liquidated damages, and this contract shall thereupon become null and void. This is of the essence of this contract, and of all the conditions hereof.

"The notices required to be given by the terms of this agreement shall in all cases be construed to mean notices in writing, signed by or on behalf of the party giving the same, and the same may be served either upon the other party or his agent.

"This contract shall be held by E. A. Birch in escrow for the mutual benefit of the parties concerned, and after the consummation of the sale he shall be at liberty to retain the canceled contract. And it shall be the duty of said E. A. Birch in case said money is not paid as herein provided, to deliver this contract to the vendor or his agent on demand.

"Witness the hands of the parties hereto this 4th day of September, A. D. 1897.

"CAROLINE RUBO.

"JOHN C. BENNETT."

There was also then executed a lease made by appellee as lessor, to appellant and her son as lessees, purporting to demise the premises in question for eight months from September 1, 1897, at a monthly rental of three dollars, payable in advance at office of E. A. Birch & Co.

All the arrangements for the extension of the two mortgages were made by the appellant, partly before and partly after the agreement between appellant and appellee was entered into. Appellee testified:

"At the date this warranty deed attached to the bill of complaint was executed, I told Mrs. Rubo if it was executed and the contract, and they got the extension of those loans, that I would buy the property with \$2,749.27,

about \$2,750, against it—that was the amount of the mortgages—and pay her \$500 for it, and give her an option to purchase it within one year for \$1,000. She said she thought she could sell it for \$1,500 or \$5,000. I didn't think she could. She said they had arranged with the loan people for the first loan. The second loan, I believe, at that time had not been arranged for, and thought they could get Mr. Haskamp. I believe he was a friend of Mrs. Rubo, or an acquaintance of her husband, living at Evanston. Mr. Birch said he would talk to him and get that extended. Those papers were executed with the understanding that that should be done, and it was afterward done."

After the executing of the deed and other papers the following transactions and circumstances occurred relating to the matter in question: Appellant obtained extension of the second mortgage of \$249.23. Appellant remained, and ever since has been, in possession of the premises. No rent has been paid by her and no rent demanded by appellee. After the making of the deed on September 4, 1897, appellant executed extension notes for the first mortgage loan, and paid two of such notes, amounting to \$75 each, in the year 1898. On August 22, 1898, she paid the taxes of 1898 upon the property, amounting to \$63.03. She also made repairs and paid for insurance upon the cottage.

Evidence as to value of the premises is conflicting. The estimates of experts called as witnesses vary from \$35 to \$60 per front foot. The agent of the first mortgagee estimated the value in making the loan at \$5,000 for the land and \$700 for the cottage. Appellee also paid some interest on the mortgage loans after September 4, 1897, the date of the warranty deed, the amount so paid by him being \$87.50. He testified that he had not paid the other interest after receiving the deed because "it was paid each time when I got there," and that he believed that Mrs. Rubo (appellant) had paid it. In September or October, 1898, appellee bought the second mortgage notes, amounting then to \$240 and some interest, and he testified that he now holds them for his wife's mother, with whose money he claims to have bought the notes.



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The evidence as to the conversation between the parties, at the time of the execution of the deed and other papers, is limited to the testimony of appellant and appellee. Appellant testified :

“ Afterward I met him when I was trying to get a loan. I went to Mr. Birch and he told Mr. Bennett to let me have it—\$500. I went back and forward with Mr. Birch to Mr. Bennett’s office, and at last he said : ‘ I think I can let you have —.’ He came again to my place. He said, I think he will let you have \$1,000; he said I should go to Mr. Bennett’s office to receive it. My taxes were due and a mortgage was near due. I took my tax book along; I thought when I received the money I would pay my taxes right away. So Mr. Birch, when I got there—I don’t know exactly the date—the first time I was there, I guess, was the 4th of September, 1897.

“ Mr. Birch wasn’t there. As I came in Mr. Bennett asked me if I knew what I was there for. I said Mr. Birch told me he intended to let me have \$1,000. He says, ‘ Well, if you don’t understand it, I want nothing to do with you.’ He knew my taxes were due and everything else, and that I was looking for money. He said I ought to have somebody there to attend to it. I says, I thought I had Mr. Birch there to attend to it; to get the money for me. Finally he told me how he would do; he would lend me \$500 for one year, and instead of \$500, I should pay him \$1,000 back. \* \* \* I signed the papers that he had drawn up for the money.”

And further, upon cross-examination :

“ In place of \$500 I wanted \$1,000; he wanted \$500. He said he would lend me \$500 and in place I should give him \$500; he wanted \$1,000 back in one year. I was saying that was too much. He said it wasn’t too much, because he would be responsible for what came in; that I wouldn’t pay the taxes there or anything; he would pay that.”

“ What did you say then? A. I thought it wasn’t so very much, if he would pay that up for me. I thought it wouldn’t come so very high, but there was nothing paid, that was all he said; he said he wouldn’t do more than that, and that Mr. Birch should get those papers to rent the place, and the money should go for the interest, and he should save the money for me—Mr. Birch should. Mr. Bennett told him so at the same time. I guess that is all that was said there.

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"Q. Why did you think it was necessary for you to make this arrangement with Mr. Bennett at this time? A. I wanted to pay my taxes, and this interest renewed—this mortgage renewed.

"I have heard the testimony of Mr. Bennett. Mr. Bennett, in conversation with me at the time the deed was signed, did not ever say to me that he was going to buy the property. The word 'buy' was not used in that conversation."

Appellee testified :

"When she first came to my office in 1897, relating to the transaction in question in this suit, she said in reference to the deal, 'You know my property on Maple avenue is encumbered and the encumbrance is nearly due, and my taxes are nearly due, \* \* \* and I have got to do something about the property or the mortgage will be foreclosed.' Previous to that time I had learned that this property was encumbered; I knew it at that time. She said she had attempted to make loans, \* \* \* and that they wouldn't make her a new loan, and she wanted me to help her out on her encumbrance. She would like to make a loan of money, a third loan of money, until such time as she could sell the property. I told her the property was encumbered nearly all it was worth, being then encumbered for something like \$3,100, and that I wouldn't consider a loan under any circumstances. The loan was previously spoken of, and I had answered it in one word that I wouldn't contemplate the subject for a minute—for a third loan, all of them due and the taxes due, and a tax sale about to start.

"Those things were all talked over. We talked of how much the encumbrance was in a general way; we couldn't get at the exact figures; we couldn't get at the taxes and assessments, and I didn't know how much the interest on the first mortgage was; I think it was stated to be \$87.50, which it afterwards proved to be. There had to be an extension of the loan and the commissions would carry the encumbrance up to what I considered the value of the property. She said she was going to lose it, because if the mortgage was foreclosed she could not afford to redeem it; she hadn't the money. Mr. Birch, who was with her, told me he had been her agent for several years. I said I thought the property was encumbered for nearly all it was worth, and I didn't want to bother with it. She asked me if I could possibly do something to help her out until she could

get a chance to sell it. She said it would be a great favor. I think the woman almost wept. \* \* \*

“Q. After this conversation did you say to Mrs. Rubo that you would put a second mortgage on the property?

“A. I did not. \* \* \* I often stepped into Mr. Birch's office, and she was frequently there. I saw her several times. I don't know whether between these dates or not. I don't really remember the exact date this deal was made and the papers drawn up, but I think the 4th of September, 1897. I don't remember the exact date. The date is on that deed.

“Q. State what took place at any other conversation relating to this transaction on the 4th of September, 1897, when the deed attached to the bill of complaint was executed by Mrs. Rubo? A. I was sitting at my desk when Mrs. Rubo came in. She said, ‘Is Mr. Birch here?’ I said, ‘No.’ She said, ‘He made an appointment to meet me here this morning.’ She said she was anxious to see him. She waited, I guess, twenty minutes or fifteen minutes, and she said she was anxious to go and would like to sign the papers and go, and not wait for Mr. Birch, because he might not come. I had in the meantime told Mr. Birch that I would purchase it for \$500. Mr. Birch had evidently told her and she came in. I had drawn up the deed and contract in evidence here and she said she wanted to sign it. I had the stenographer come in and read the contract to her. This document now shown is the contract, to the best of my knowledge and belief. I saw Mrs. Rubo sign it in September, 1897. It was read to her before she signed it. At the date this warranty deed attached to the bill of complaint was executed, I told Mrs. Rubo if the deed was executed and the contract, and they got the extension of those loans, that I would buy it with the \$2,749.27, about \$2,750, against it—that was the amount of the mortgages—and pay her \$500 for it, and give her an option to purchase it within one year for \$1,000. She said ‘see thought she could sell it for \$4,500 or \$5,000. I didn't think she could. She said they had arranged with the loan people for the first loan; the second loan I believe at that time had not been arranged for. \* \* \* I told her I cared nothing about the property in the matter of rents as long as she intended to take advantage of the option. She said she would like to have her son live in it. I said, ‘You and Mr. Birch take care of the property and get all you can out of it, and pay it on the taxes; I have nothing to do

with it until you have either bought it or get out of it under that agreement.' I don't know what she said about it."

The trial court, after hearing in open court, upon bill, answer and replication, entered a decree dismissing the bill for want of equity.

DENNIS & RIGBY, attorneys for appellant.

The line between mortgages and conditional sales is very narrow; the decision of the question usually depends not alone or even chiefly on the form of the document or the express declaration of the parties, but rather on the circumstances surrounding the entire transaction; in other words, it is a question of intention, and the intention of the parties must be gathered rather from their acts and circumstances than from express declarations. *Miller v. Thomas*, 14 Ill. 428, 430; *Bearss v. Ford*, 108 Ill. 16, 23; *Workman v. Greening*, 115 Ill. 477, 479, 480; *Peugh v. Davis*, 96 U. S. 332, 336, 338, 24 L. Ed. 775; *Montgomery v. Spect*, 55 Cal. 352; *Jasper v. Hazen*, 4 No. Dak. 1; 23 L. R. A. 58.

The question being really whether a debt was created or not, and being one of intention, as stated above, the following *indicia* of intention have been held important as pointing to the existence of debt, and thus that the transaction was in the nature of a mortgage.

First. That interest or an increased consideration was to be paid to the grantee for the use of his money. 15 Am. & Eng. Ency. Law, 781.

Second. That there had been, when the deed was executed, negotiations pending for a loan. *Horn v. Keteltas*, 46 N. Y. 605; *Fiedler v. Darrin*, 50 N. Y. 438, 442; *Davis v. Demming*, 12 W. Va. 246, 283.

Third. That the parties by their acts did not treat it as a sale, but the grantor remained in possession as owner. *Clark v. Finlon*, 90 Ill. 245, 246, 247.

Fourth. The character of the transaction must be determined by what it was at its inception. "Once a mortgage always a mortgage." 15 Am. & Eng. Ency. Law, 782.

Fifth. Inadequacy of consideration is a valuable, though

not conclusive evidence of mortgage. *Perce v. Robertson*, 13 Cal. 116; *Morris v. Nixon*, 42 U. S. 118; 11 L. Ed. 69.

Sixth. Mrs. Rubo's own valuation is important upon the question of intention, as proving that she never would have consented to a sale upon the terms of the one claimed by Bennett to have been made. *Jasper v. Hazen*, 4 No. Dak. 1; 23 L. R. A. 58, 65.

Seventh. The acts of the parties after the execution of the deed are important as showing their understanding of the transaction immediately after its conclusion. *Jasper v. Hazen*, *supra*, 4 No. Dak. 1; 23 L. R. A. 58, 65.

Each case must be judged by its own circumstances; but if the circumstances surrounding the transaction leave the intention doubtful, the leaning of the court will be toward construing the agreement to be a mortgage. 15 Am. & Eng. Ency. Law, 783.

J. C. BENNETT, *pro se*.

The deed on its face is absolute, and the burden is on complainant to prove by clear and satisfactory evidence that it was in fact a mortgage. *Strong v. Strong*, 126 Ill. 301, 308; *Story v. Springer*, 155 Ill. 25-31; *Jones on Mortgages*, Vol. 1 (4th Ed.), Sec. 293.

Land can not be conveyed as security for a debt where no debt exists. *Rue v. Dole*, 107 Ill. 275.

One who alleges that his deed in absolute form was intended as a mortgage only, is required to make strict proof of the fact. Having deliberately given the transaction the form of a bargain and sale, slight and indefinite evidence should not be permitted to change its character. The proof must be clear, unequivocal and convincing. The fact that the grantor understood the transaction to be a mortgage is not alone sufficient. *Jones on Mortgages*, Vol. 1, 4th Ed., Sec. 335. See, also, *Bentley v. O'Bryan*, 111 Ill. 62, and cases there cited.

Even if it appeared that the grantor remained in possession, in continuance of his former occupancy, it would not be sufficient to show a deed to be a mortgage. *Pitts v. Cable*, 44 Ill. 103-107.

In a contract partly printed and partly written the written part is to be given greater weight than the printed. Am. Eng. Ency. of Law, 1st Edit., Vol. 3, p. 868, note; Bolman v. Lohman, 79 Ala. 63; Michaelis v. Wolf et al., 136 Ill. 68, 72.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

But one question is presented upon this appeal, viz.: whether, upon all the evidence, the deed in question, though absolute in its form, should be held to be in fact a mortgage. The statute, section 12, chapter 95, Revised Statutes, provides that "every deed conveying real estate, which shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage."

The decisions of our Supreme Court are uniform in holding that where it clearly appears from the evidence that the parties to a deed absolute in form have intended that it should operate as a mortgage only, to secure a debt, then the courts should hold it to be in effect a mortgage. Miller v. Thomas, 14 Ill. 428; Smith v. Cremer, 71 Ill. 185; Heald v. Wright, 75 Ill. 17; Clark v. Finlon, 90 Ill. 245; Bearss v. Ford, 108 Ill. 16.

And there is a long line of decisions, from Pitts v. Cobb, 44 Ill. 103, to Story v. Springer, 155 Ill. 25, in which, while it has been held that under the peculiar facts presented in the respective cases the deed should be held to be absolute in its effect according to its terms, yet the well established rule is not departed from, but asserted—that if it appear clearly and from satisfactory evidence that the intention of the parties was that the deed should have the effect of a mortgage only, that intention will be carried out by the courts.

It is also held that a deed absolute in its terms should not be given a different effect unless the evidence is clear and satisfactory to warrant it.

The rule of law governing is well settled. The question

presented and determinative of the case is one of fact only. The weight accorded to the findings of fact by the trial judge, who has seen and heard the witnesses, is also to be considered in passing upon the question here presented. With due consideration for this, we have examined the evidence in the case with great care, and from it all we are compelled to reach a conclusion different from that of the learned chancellor who entered the decree. It is true that there are but two witnesses to the controlling facts; but one of them has testified to a state of facts inherently improbable, and the other is corroborated by all the surrounding and subsequent circumstances of the transaction.

If the account of the transaction given by appellee is true, then this woman has deeded to him her property, worth at the least estimate of the witnesses, \$4,200, and at the highest estimate \$6,700, subject to \$2,750 of indebtedness, for the sole consideration of \$500, which sum of \$500 and nearly a hundred dollars additional, the vendor at once proceeded, under agreement with appellee, the purchaser, to expend upon the property which she had sold.

Mere inadequacy of price is not alone good ground for holding this deed to be a mortgage. *Story v. Springer*, 155 Ill. 25. But where no consideration whatever moves to the grantor, except money advanced to be expended upon the land, it is a fact tending very strongly to show that there was no sale.

Aside from the matter of adequacy of consideration for the deed, all the circumstances surrounding the transaction and the conduct of the parties subsequent thereto, lead to the conclusion that the parties intended the deed as security for the repayment of the \$500 expended upon the land by appellee, together with an additional \$500 for forbearance money. The undisputed evidence shows that at the time of the negotiations appellant was seeking a loan, not a purchaser; that she valued the land at much more than the sum made up by the \$500 and the encumbrances, and, according to appellee's own statement, still expected to realize such sum by a sale in the future; that appellee said to her that

he cared nothing about the property in the matter of rents as long as she intended to take advantage of the option; and that he had nothing to do with the property until she should either "have bought it or got out of it under that agreement;" that appellant obtained the extension of mortgages after the alleged sale and executed interest notes thereon; that she paid certain of these notes, and that she paid for insurance and taxes. We are inclined to think that appellee, while exercising his skill as a lawyer to give the transaction all the *indicia* of an absolute sale, yet did not himself regard it as constituting anything but security. In his examination as a witness, the following occurred :

"Q. You wanted \$500 for the use of your \$500 for a year, is that the idea? A. No, assuming the risk."

All of these admitted facts are wholly inconsistent with the theory that appellant had parted with, and appellee had acquired, both the legal and equitable ownership of the land. It is clear that, according to the ostensible transaction, the mortgages were assumed by appellee as part of the purchase money. The amount of the mortgages and the \$500 together make \$3,200, the expressed consideration of the deed. If the transactions were in reality a sale, appellee and not appellant thereafter bore the obligation to pay these mortgages and the interest notes for interest thereon. Such would be the obligation arising, as a matter of law, from the mortgage indebtedness being treated as a part of the consideration. And as a matter of fact, appellee testifies that he did assume these mortgages. In answer to the question, "What is the amount you assumed?" he testified "\$2,745.27." And yet appellant proceeds thereafter, with the apparent acquiescence of appellee, to care for the extension and payment of interest upon this indebtedness assumed by appellee.

The testimony of appellee, that an absolute sale was intended, is, as we view it in the light of all the surrounding circumstances, incredible.

If the testimony of appellant be taken as true, as we think it should be in view of all the facts and circumstances



proved, then appellee could have enforced the payment of his loan of \$500 (without the usurious interest contended for) in an action at law.

While, perhaps, no one of these facts, inconsistent with the theory of an absolute sale, would be sufficient of itself to constitute the clear and satisfactory showing which the law requires, yet each is entitled to consideration, and together they present a strong case.

The fact that negotiations for a loan were pending when the deed was made, is to be considered. *Fiedler v. Darrin*, 50 N. Y. 437; *Morris v. Nixon*, 1 How. 118; *Davis v. Demming*, 12 W. Va. 246.

The fact that the grantee retained possession of the premises is to be considered. *Clark v. Finlon*, *supra*.

We do not regard the existence of a lease, which neither party ever treated as operative, as affecting the fact of possession by appellant.

The circumstances of appellee leaving appellant to bear the burden of loan extensions, interest payments and insurance, are all entitled to consideration. *Miller v. Thomas*, *supra*, wherein the court said: "In cases of this sort the real character of the arrangement may as often be gathered from the nature of the transaction and character of the circumstances as from the express declaration of the parties."

Inadequacy of consideration, though not alone controlling, is to be considered. *Story v. Springer*, *supra*.

And in case of doubt existing from all the surrounding circumstances, a court of equity will lean to the holding that it is a mortgage rather than a sale. *Conway v. Alexander*, 7 Cranch, 218.

In that case it was held that the facts established an absolute sale; but the court held, as a rule applicable to the determination, that "the want of a covenant to repay the money is not complete evidence that a conditional sale was intended," and "doubtful cases have generally been decided to be mortgages."

The decision in *Clark v. Finlon*, *supra*, is very much in

point, and also the decision in *Jasper v. Hazen*, 23 L. R. A. 58.

While each case of this class, where it is attempted to be established that a deed absolute in form is in reality only a mortgage, must of necessity be determined by the facts of the individual case, measured by the rule of law that the evidence must be clear and satisfactory to warrant a court in holding the facts established, yet the cases above cited are enough alike in the facts presented, to be especially applicable to the case here considered.

We hold, therefore, that the findings and decree of the trial court are manifestly against the weight of the evidence.

The decree is reversed and the cause remanded.

85	488
99	1596

### West Chicago St. R. R. Co. v. Elizabeth Byrne.

1. **VERDICTS—Against the Weight of the Evidence—Unsupported Testimony of the Plaintiff.**—The unsupported testimony of a plaintiff will not suffice to sustain a verdict, where such testimony is contradicted in its material parts by a witness for the defendant, and such witness is corroborated by other credible evidence.

2. **SAME—Effect of All the Decisions.**—Where the plaintiff only affirms under oath, and the defendant denies under oath the existence of the necessary fact, and the latter is corroborated by another witness, or other witnesses who are credible, then, as a matter of fact, there can not be said to be a preponderance of the evidence in support of the plaintiff's affirmation.

3. **ATTORNEYS—Talking with Witness in Preparing Cases.**—The mere fact that attorneys at law, in preparing their cases for trial, have talked with a witness, should not be presented to the jury as ground for discrediting such witness.

**Action in Case, for personal injuries.** Appeal from the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed November 16, 1899.

**Statement.**—This suit was brought by appellee to recover damages for personal injuries alleged to have been sustained by appellee through negligence of appellant.

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West Chicago St. R. R. Co. v. Byrne.

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Appellee was a passenger upon one of the cars of appellant, and it is disclosed by the evidence that she was injured while attempting to alight from the car at a street crossing. There is a conflict in the evidence as to whether the injury resulted from the negligence of appellant in starting its car while appellee was in the act of alighting, as alleged by the declaration, or from negligence of appellee in attempting to alight after the car was in motion, as claimed in defense by appellant.

Upon the facts and circumstances of the injury there were four witnesses, viz.: appellee, in her own behalf, and three on behalf of the appellant—the conductor of the car, and two young girls—who testified that they witnessed the occurrence. No one of the other witnesses can be said to have given any testimony as to how appellee fell or was thrown from the car.

The cause has been tried twice. Upon the first trial a verdict for appellee resulted, assessing her damages at \$2,500. That verdict was set aside by the trial court. Upon this, the second trial, the issues were again found for appellee and her damages assessed at \$1,200. Upon this latter verdict the judgment was rendered from which this appeal is prosecuted.

VAN VECHTEN VEEDER and B. F. RICHOLSON, attorneys for appellant.

KING & GROSS, attorneys for appellee.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

The principal question presented is as to whether the evidence is sufficient to support the verdict. It is not contended, and could not well be, that there is no evidence to sustain the finding of the jury, for the testimony of appellee, alone considered, very amply sustains the allegations of her declaration. But it is argued that the verdict is against the weight of the evidence, and should therefore have been

set aside by the trial court. In that behalf it is contended that the unsupported testimony of a plaintiff will not suffice to sustain a verdict, where such testimony is contradicted in its material parts by a witness for the defendant and such witness is corroborated by other credible evidence. In support of this contention counsel cite *Haycraft v. Davis*, 49 Ill. 455; *Lincoln v. Stowell*, 62 Ill. 84; *C. W. D. Ry. Co. v. Conley*, 43 Ill. App. 347; *N. C. St. R. R. Co. v. Fitzgibbons*, 54 Ill. App. 385.

We do not, however, conclude from these decisions that there is any fixed rule to the effect that wherever the testimony of the plaintiff stands alone, and there are several witnesses for the defendant, therefore there can be no verdict based upon the plaintiff's testimony alone and supported by a preponderance of the evidence.

A case which goes further to support the contention of counsel for appellant than any cited by them is *Peaslee v. Glass*, 61 Ill. 94, wherein the court said :

"It belongs to the plaintiff to make out a case. The burden of proof is upon him, and when the issue rests upon the sworn affirmation of one party and the sworn denial of the other, both having the same means of information and both unimpeached, and testifying to a state of facts equally probable, a conscientious jury can only say that the plaintiff has failed to establish his claim. Without saying that this court would set aside a verdict for the plaintiff, rendered in such cases, on the ground alone that it was not sustained by the evidence, we must set aside one resting only upon the evidence of the plaintiff when that is contradicted not only by the defendant, but also by another witness, and there are no elements of probability to turn the scale."

But the effect of all these decisions is merely that where there is the plaintiff only affirming under oath—and the defendant is denying under oath—the existence of the necessary fact, and the latter is corroborated by another witness, or other witnesses, who are credible, then, as a matter of fact, there can not be said to be a preponderance of the evidence in support of the plaintiff's affirmation. And if in the case here it could be said that

the testimony of the three witnesses squarely contradicted the testimony of the appellee in its material parts, and that the testimony of each of these three witnesses was entitled to as much credibility as the testimony of appellee, then it would certainly follow that the verdict based upon appellee's testimony alone was manifestly against the weight of the evidence.

But, after a careful examination of all the evidence, we are not prepared to hold that this case comes within the class of cases above cited. The testimony of appellee is consistent; she is not impeached; and we see no reason, appearing from her testimony, for discrediting her account of the occurrence in question. On the contrary, we do not regard the testimony given by the witnesses for appellant as entitled to like weight. The conductor testified that he was watching a young lady alight from the car, and that "the only thing I saw the old lady (appellee) do between the time I gave the signal to go ahead, two bells, and the time I gave the signal to stop, one bell, was, she went off onto the ground on the left, south side, of the car. The first move I saw her make after I gave the signal to start was just to turn around; and when she turned in that manner I rang the bell to stop." All of which is consistent with the account given by appellee, if the conductor at the moment of signaling the car to go ahead was watching the passenger who was departing and did not see appellee, who was attempting to alight. He also stated, "While the young lady was getting off, and while I was standing there, and after I had given the signal to go ahead again, the old lady set perfectly still, so far as I could see." But that he looked into his car, and hence could see what appellee was doing at the moment when he started his car forward, is not disclosed. He also testified:

"After the first woman got off the car it was a couple or three seconds before I started the car. I turned right around and I saw she was off, and then I turned around and saw that the old lady was sitting there, just the same as I am sitting here. I turned around again, and then started the car and never took my fingers off the bell

rope; then the old lady reeled right around and off she went on all fours. I did not see her stand up in the body of the car. I did not see her walk to the step. I did not see her get out onto the step. The only thing I saw about her is that I saw her go out all at once; then I rang the bell to stop."

From which it would appear that at the precise time when the conductor signaled his motorman to start the car, he had again "turned around" and was not looking forward into his car to note if other passengers were attempting to alight. The car was an open one, from which passengers might alight at the sides. The version given by the conductor is not so inconsistent with appellee's version—viz., that she was attempting to leave the car while it was standing, and while so doing the car started up—that we can say that the one clearly contradicts the other.

The jury might properly have disregarded the testimony of the two girls. One of them testified that she saw a lady fall, but could not state "whether she fell in the car or out of it." The other testified that in response to a question if she was hurt, appellee stated that "she didn't think that she was hurt;" in which respect she is contradicted by the conductor, who testified that appellee said "she thought her wrist was hurt a little." The two girls were upon the sidewalk and saw from there whatever they witnessed of the occurrence. Neither is clear as to the precise manner in which appellee fell. One of them stated that she did not know how appellee fell. The other stated that, when appellee stood up the conductor rang the bell to stop. The conductor testified that he did not see appellee stand up at all. Altogether the testimony of the three witnesses for the appellant is so uncertain, and in some respects so conflicting, that we can not say that it overcomes in weight the testimony of appellee. We hold that the judgment should not be disturbed upon the ground that the verdict is manifestly against the weight of the evidence. Nor do we regard the verdict as excessive in amount. If the testimony of appellee, and that of the physician called as a witness in her behalf, is to be credited, the injury is permanent and

will always seriously interfere with the use of appellee's arm in any kind of work.

The only errors in procedure assigned and argued by counsel here, are two, viz. : that the court erred in making an improper comment in the hearing of the jury, and that the court erred in permitting certain questions in cross-examination of appellant's witnesses.

As to the first, it is enough to say that no exception was preserved to the remark of the court. We are not disposed to regard the remark in the connection in which it was made as being improper or likely to prejudice the appellant. But the fact that no exception was taken disposes of any other consideration of the matter.

As to the second, counsel for appellant complains that the trial court, over his objection, permitted a witness for appellant to be questioned upon cross-examination as to conversation had before the trial with the attorney for appellant. We agree with counsel that the mere fact that attorneys at law, in preparing their cases for trial, have talked with a witness, should not be presented to the jury as ground for discrediting such witness, for it is the duty of the attorney, in preparing his case for trial, to learn from witnesses what testimony they can give, in order to enable the attorney to conduct the trial on his part with expedition. To endeavor to learn from a witness, for the first time, on the witness stand, whether such witness knows anything of the facts at issue, would involve a needless waste of the time of the court. Nevertheless, the substance of conversation had before the trial, between the witness and the attorney, or others, in relation to the testimony to be given, might be proper subject of inquiry and within the field of legitimate cross-examination. We think that there was no error in permitting the question to be answered. No other question is raised as to the procedure. The judgment is affirmed.

**Jenkins & Reynolds Co. v. Herman F. Lundgren.**

1. **STATUTE OF FRAUDS—Collateral Promises.**—The test whether a promise is direct or collateral is whether the credit was given to the person making the promise or to a third person.

2. **SAME—Where Credit is Given to the Promisor.**—Where the credit is alone given to the promisor the statute does not apply; it only affects verbal promises for the payment of the debt, default or miscarriage of another person.

**Assumpsit**, on promises. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed November 7, 1899.

**Statement.**—This is an action wherein the appellant, a corporation, seeks to recover upon an alleged verbal promise by the appellee, to the effect, as stated in a special count of the declaration, that if, at his request, appellant would sell and deliver to a third party certain pressed brick, to be used in a house then being built by appellee, he "would see that the said plaintiff (appellant) was paid therefor." It is alleged that appellant did thereupon sell and deliver said brick at appellee's premises on the order of said third party. The declaration also contains the common counts.

To this declaration appellee pleaded the general issue, and also pleaded that the alleged contract being to answer for the debt of another, and verbal, is void by the statute of frauds.

The case has been twice tried. In the trial now appealed from no evidence was offered on the part of appellee, but the jury found in his favor, as had been the result at the previous trial.

J. A. COLEMAN, attorney for appellant.

DEO C. KREIDLER, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

The promise set forth in the declaration is that appellee "would see that" the brick was paid for. This is not a clear and express promise to actually pay for them himself.



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Jenkins & Reynolds Co. v. Lundgren.

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Its meaning may have been that he, as owner of the premises upon which the house was being erected, would see that the brick was paid for, either by the contractors who signed the order for it, or out of money which would be due them as contractors from appellee. It is not literally an absolute promise to pay the debt himself.

It appears that subsequently appellant sent to appellee a notice of lien, and that appellee called and stated that he had overpaid the contractors, but offered to pay appellant a part of its demand, and share the loss. His offer was refused, appellant's manager telling him the company wanted the full amount. It appears from the evidence of appellant's witnesses that the account was sent both to the contractors and to appellant, for the reason, as stated by the witness, that it was "customary to send a notice to the owner as well as to the contractor."

It is contended in behalf of appellant that the promise declared on in this declaration is original and not merely collateral. In *Hartley Bros. v. Varner*, 88 Ill. 563, cited by appellant's counsel, there was testimony that Varner, the appellee in that case, told one Hartley that if the latter's firm would sell a third party goods he "would see it paid." There was also additional testimony of an agreement to become responsible, one witness stating that Varner told him (the witness) that he had authorized the Hartleys to sell goods to the third party, "and he would stand good for the same and pay for them if Reubottom did not." Here was evidence of an express promise, and the court held it original, not collateral, and hence unaffected by the statute of frauds.

In *Berkowsky v. Viall*, 65 Ill. 349, the promise by an owner to one furnishing materials to a contractor who was putting up a building for such owner, was, "You go on and furnish the necessary materials to finish the building and I will see that you get your money for what you put in here." It was held that the promise was original and the owner liable for material thereafter furnished.

Whether the promise declared on in this case be considered a promise by appellee to pay for the brick himself,

or not, it does not appear from the evidence that credit was actually given to appellee. The order for the brick was signed, not by appellee but by the contractors, and a statement of account was made out by appellants against the contractors, jointly with the appellee. This indicates that credit was not given solely to appellee as the original debtor. In *Schoenfeld v. Brown*, 78 Ill. 487-489, it is said:

"The test in such cases is, whether the promise is direct or collateral; and the most ready means of solving the question is whether, in such cases as the present, the credit was given to the person making the promise, or to a third person. Where the credit is alone given to the promisor, then the statute can not have any operation, as it only affects verbal promises for the payment of the debt, default or miscarriage of another person."

In the present case the credit clearly appears not to have been given to the appellee alone. The jury having found in favor of appellee we are not warranted by the evidence in disturbing their verdict.

It is urged by appellant that the court instructed the jury orally. The so-called oral instruction was to the effect that if they found for the plaintiff their verdict should be for the sum claimed, and if they should find for the defendant, their verdict should be for the defendant. We regard this as a mere explanation as to the form of the verdict, and not such an instruction as, under the statute, is required to be in writing.

It is urged that the court erred in refusing to give certain instructions as requested by appellant.

The refused instructions told the jury that if they believed certain things from the evidence "then the law is for the plaintiff, and the jury will so find." The jury were not required to find the law. It was their province to pass upon the facts. No other instructions appear to have been requested, and those refused were not pertinent to the issue raised by the plea setting up the statute of frauds. We regard some of them as erroneous in other respects.

We find no reason to interfere with the verdict of the jury and the judgment of the Superior Court, and said judgment is therefore affirmed.

85	497
88	511
86	497
180	156

## West Side Auction House Co. v. Connecticut Mutual Ins. Co.

1. **VERDICT**—*When It May Be Ordered for the Plaintiff.*—In an action for rent where the lease, together with the testimony offered on behalf of the plaintiff, makes a *prima facie* case of rent due under its terms, and all the evidence offered by the defendant is insufficient to show a defense, the court may properly direct a verdict for the plaintiff.

2. **EVIDENCE**—*Under a Plea of Nul Tiel Corporation.*—In an action for rent between two corporations the lease offered in evidence between the parties as corporations, is sufficient *prima facie* evidence of the plaintiff's corporate capacity to overcome the plea of *nul tiel corporation*, where there is no evidence to rebut it.

3. **LEASE**—*Execution of, by a Corporation.*—Where a lease is signed by the secretary of a corporation as such secretary, and on the margin above his signature appears the impression of a seal containing the name of the corporation and the word "seal," it is *prima facie* evidence that it was executed by authority of the corporation, and parties objecting take on themselves the burden of proving that it was not so executed.

**Assumpsit, for rent.** Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed November 16, 1899.

W. A. PHELPS and J. B. MUIR, attorneys for appellant.

E. PARMALKE PRENTICE, attorney for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellee brought suit against appellant in assumpsit in the Superior Court, to recover rent under a lease from May 1, 1895, to April 30, 1896, for the last five months of the term. The declaration consists of two special counts, the first upon the lease, the second for use and occupation, and the common counts. The pleas were the general issue; *non est factum* sworn to; surrender of the premises referred to in the first count and acceptance of same; that defendant did not use and occupy the premises described in the second count; and, lastly, *nul tiel corporation*. Issues were formed on these pleas and a trial was had

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before the court and a jury, resulting in a verdict directed by the court, and judgment thereon for \$1,127.90 against appellant, from which this appeal is taken.

It is claimed that the court erred, first, in instructing a verdict for plaintiff; second, in allowing in evidence the lease sued on; and third, that there was no evidence to sustain the claim of appellee of a former adjudication.

A suit between the same parties to recover previous installments of rent under the same lease was before the Branch Appellate Court of this district at the March term, 1898 (76 Ill. App. 635). What is there said sufficiently disposes of the alleged error of the trial court in admitting in evidence the lease sued on. As to the sufficiency of the execution of the lease here in question, and the correctness of the ruling of the trial court in admitting it in evidence, may be cited, in addition to the authorities in the opinion of the Branch Appellate Court, the case of *Kinzie v. Trustees of the Town of Chicago*, 2 Scam. 187.

As to the point that the court erred in directing a verdict for appellee, it is sufficient to say that the lease, together with the testimony offered on behalf of appellee, made a *prima facie* case that there was due to it rent under the terms of the lease for the month of December, 1895, and for January, February, March and April, 1896, at the rate of \$200 per month, together with interest thereon at the rate of five per cent per annum, which was shown to be \$127.90. The only evidence to meet the *prima facie* case of appellee was to the effect, in substance, that appellant had not occupied the premises in question since December 1, 1895, and that on October 30, 1895, the keys of said premises were sent to Isham & Prentice, agents of appellee, and there given to a man in charge of the agent's office, the messenger delivering the keys stating, for appellant, that it was giving up the premises in question. He also, at the same time, delivered a letter from the appellant's secretary to Isham & Prentice, which stated that it returned the keys and had no further use for said premises. The gentleman to whom the keys were delivered said he would take care of

them. On the same day the representative of Isham & Prentice, in response to appellant's letter to them, wrote appellant that Isham & Prentice would hold the keys for appellant subject to its order, but that they could not consent to any cancellation of the lease, if that was what was intended by appellant's letter, and that they would assume no responsibility for the property. It was also shown that Isham & Prentice, in the early part of November, 1895, put up signs on the premises "to let and rent," and that they also cleared out and fixed up the building.

This evidence was all the evidence offered by appellant which could in any way be said to show any defense upon the merits to appellant's claim. It was insufficient to show a defense by way of surrender and acceptance of such surrender. There is no evidence whatever that Isham & Prentice had any authority to accept a surrender of the leased premises, or to cancel the lease, and even if they had, they declined so to do. As agents of appellee and representing it, they had a perfect right, when they found the premises had been vacated by appellant, to put up signs to rent, and also to clear out the building and prepare it for another tenant. *Humiston v. Wheeler*, 175 Ill. 514; *Gaines v. McAdam*, 79 Ill. App. 208.

As to the evidence of former adjudication, it consisted of the pleadings and judgment in the former suit, and the testimony of a witness that the lease offered in evidence in this case was also offered in evidence in the former suit, and that the former suit was brought upon the same lease. It was for the trial court to determine whether this was sufficient evidence of a former adjudication upon any of the issues of the case at bar. We can not say that there was any error of the court in admitting this evidence, and if there was error it could not prejudice appellant, because, as we have seen, it made no defense upon the merits.

It is also contended that appellee offered no evidence that it was a corporation, and therefore, under the plea of *nul tiel corporation*, appellee's suit should fail. This contention is not sustained by the record. The lease offered in evidence

is a contract between appellant and appellee, as a corporation. The contract with appellee, as a corporation, is sufficient *prima facie* evidence of its corporate capacity and overcame the plea of *nul tiel corporation*. There is no evidence to rebut it. *Brown v. Mortgage Co.*, 110 Ill. 240; *Hudson v. Green Hill Seminary*, 113 Ill. 625; *Ward v. M. & N. W. R. R. Co.*, 119 Ill. 295.

The judgment of the Superior Court is affirmed.

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**Fuller & Fuller Co. v. Adolph Gaul, Henry Best, John J. Johnson, J. E. Norling and William G. King.**

1. **SECRET TRUST**—*A Conveyance Absolute on its Face but Intended as a Mortgage.*—A conveyance of property which is absolute on its face, but which is really intended as a mortgage or security, is valid as between the parties, but is fraudulent and void as to creditors.

2. **FRAUD**—*Sales to Hinder and Delay Creditors.*—A vendee who purchases property of an insolvent debtor for less than its value, thereby deprives the creditors of the difference, defeats their just expectations, and tends to hinder and delay them in the collection of their claims.

3. **INSOLVENCY**—*Defined.*—Insolvency means a general inability to answer, in the course of business, the liabilities existing and capable of being enforced.

4. **VENDOR AND VENDEE**—*Secret Understanding.*—A secret understanding between the parties to a sale, for a benefit to accrue or be reserved to the vendor, the conveyance being absolute in terms, is a fraud as to creditors of the vendor.

**Creditor's Bill.**—Appeal from the Circuit Court of Cook County: the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded with directions. Opinion filed November 2, 1899. Petition for rehearing denied.

CHARLES LANE, attorney for appellant.

B. M. SHAFFNER, attorney for appellees.

MR. JUSTICE ADAMS delivered the opinion of the court. In a bill and supplemental or amended bill filed by appellant January 14, 1898, it is alleged that appellant, January

5, 1898, recovered a judgment against appellee Gaul for the sum of \$1,440.51, which was for drugs sold by complainant to Gaul; that at said date it sued out execution on said judgment and delivered the same to the sheriff, who made a demand on Gaul, notified him to file a schedule, and returned the execution January 12, 1898, indorsed, "No property found and no part satisfied." The bill alleges that on or about December 10, 1897, Gaul was engaged in the drug business in the store number 657 North Clark street, in the city of Chicago, and about that date transferred to the defendant, Henry Best, his father-in-law, his entire stock of drugs, furniture and fixtures, including a soda fountain and cash register, and that Best is pretending to be in possession; that the transfer was made to place the property transferred beyond the reach of creditors, and to enable Gaul to control and enjoy the same; that since the transfer he has exercised authority as usual, and there is no evidence of change of possession except a small card hung in the store; that the stock and fixtures were worth \$8,000 at the time of transfer, and that since the transfer, Best, in various conversations, admitted that Gaul owed him only \$2,300 at the time of the transfer, and that he had no interest in the transferred property except as security for said sum; that said property constituted the entire estate of Gaul, and that at the time of the transfer Gaul owed other creditors besides complainant, which facts were known to Best; that Best and Gaul conspired to defeat complainant's claim, and that the transfer was fraudulent; that the soda fountain transferred to Best was worth \$3,000; that on or about September 1, 1898, Gaul and Best, or one of them, made a pretended transfer of said stock of drugs, or such portion of them as then remained in the store, to John J. Johnson, who is now in possession and conducting said business, which transfer was merely colorable, etc., and August 31, 1898, said Johnson executed to William G. King a chattel mortgage of said property purporting to secure a note for \$2,360, which mortgage was without consideration, etc., and that J. E. Norling claims an interest in said property as a

member of the firm of J. J. Johnson & Co., composed of Johnson and Norling. The bill prays that the transfers to Best and to Johnson be decreed to be fraudulent, that the chattel mortgage be set aside as fraudulent, and that Best may be decreed to be personally liable for the full amount of Gaul's indebtedness to complainant, in case complainant should fail to realize its judgment because of transfers, etc. Answers were filed by all the defendants and replications to the answers, the evidence was heard in open court, and the court dismissed the bill and the amended or supplemental bill for want of equity.

The recovery of judgment by complainant, and the issuing and return of execution, as averred in the bill, and that judgment was for drugs sold by appellant to Gaul prior to the transfer to Best, are facts proved by the evidence and not controverted. Pierce, appellant's credit man, testified that he first heard of the transfer to Best on the 10th or 11th of December, 1897, and that on the 23d of that month he had a conversation with Best, in which Best said that his daughter, who is Gaul's wife, told him, the night before the bill of sale was executed, that appellant was pressing Gaul for a settlement; that he said Gaul owed him \$2,300; that he wanted security; that he was an honest man, and all he wanted was the \$2,300; that the stock was worth a great deal more than that; that Gaul told him it was worth \$8,000; that he, Best, thought it was worth \$6,000, and that if he could sell for that amount he wanted to pay all creditors; that when the transfer was made to him he knew Gaul owed appellant a large amount, and owed his landlord about \$300. This witness further testified that he suggested to Best to turn the store over to appellant, on its agreeing to run it to the best advantage, and to first pay him \$2,300, when Best said he wanted to talk with his attorney before taking such a step; that the only objection to it was that it would throw Gaul out of employment; that if Gaul did not run the store, he and his family would be on his, Best's, hands to take care of; that Gaul had nothing outside of that store, and he wanted to save something for



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Gaul; that he took the store with the understanding that Gaul was to continue to run it; that he himself was in the undertaking business and knew nothing of the drug business. This witness testified that he was in the store two months before the transfer to Best; that he understood there was some indebtedness on the soda fountain, and that the reasonable market value of the store December 10, 1897, subject to the indebtedness, was easily \$6,000. Witness further testified that, before the close of the conversation, he sent for Lane, appellant's attorney. Charles Lane, appellant's solicitor, testified that, December 13, 1897, appellant's claim was given to him for collection, and on that day he went to the store, where he saw a pasteboard card, four by six, on which was marked, "This store has been transferred to Henry Best, who is now proprietor;" that he went to Best's office and talked with him, and that Best said the store had been transferred to him for \$2,300; that he had heard that Gaul's creditors were pressing him, and he determined to have a bill of sale; that he had no disposition to beat any one, and believed the store valuable enough to pay not only the \$2,300, but the claims of all Gaul's creditors; that he thought it best to hold the goods till summer before selling, and believed they could then be sold, all of Gaul's creditors paid, and something left for Gaul. He said Gaul was attending the medical school, and that at the time of transfer it was understood between Gaul and himself that Gaul should continue as manager of the store; that Gaul was his son-in-law, and had no property except the drug store, and that managing it was the only way he could get a living; that he, Best, knew nothing about the drug business. Lane further testified that after talking with Best he went back to the store and saw Gaul, who told him he owed Best \$2,300 and gave him a bill of sale of the store, and that the store at the time of transfer was worth \$8,000. Witness says he then returned to Best's office and had another talk with him, and Best said that when he got the bill of sale he knew that Gaul owed appellant, and also owed two or three months' rent. Witness

further says: "Gaul, the night of that day, told Best and me, in the drug store, that he owed his landlord \$1,900, at which Best appeared surprised and disgusted. Best told me he thought the store worth \$6,000 just as it stood, and Gaul told me, in Best's presence, that he owed \$800 on the soda fountain and \$47 on the cash register. Two or three days after that Best said he could do nothing about appellant's claim then; that he could not sell the store; that the only thing was to wait till summer, when trade would be better, and the store could be sold to good advantage and creditors paid." Witness says that afterward he telephoned Best several times, telling him appellant would give him all the time he wanted if he would become responsible for its claim, and asking him to come to the company's office, which he finally did, and the credit man called him over. "I talked with Pierce and Best, and Best repeated in Pierce's presence, what he had said to me in regard to the transfer, the value of the store, the fact that the store constituted all Gaul's assets, and that he knew that Gaul, at the time of the transfer, was indebted to various creditors." Witness further testified that the sign he had previously referred to was over the cash register, in the corner, and from fifteen to eighteen feet back from the front door.

Herron, manager of the Onyx Soda Fountain Co., which manufactured and sold to Gaul the soda fountain in the store, testified that it was the handsomest fountain in the city; that December 10, 1897, it was worth from \$2,000 to \$2,500, and that there was then due on it from \$800 to \$1,000. He further testified that the fountain was sold to Gaul for about \$1,800; that they were just starting in business then, and wanted a little advertising, but they would not duplicate the fountain for less than \$3,000.

William F. Waldron, formerly clerk for Gaul, and who had been in the drug business six years prior to December 10, 1897, testified that at that date the property was worth \$5,000 net. He says he understood Gaul owed \$800 on the fountain.

Charles Sutcliffe, city salesman in the employ of appel-

lant for about twelve years, testified that he had had experience in buying and selling drug stores; that he had sold drugs to Gaul up to December, 1897, was in Gaul's store frequently during two or three years, and was familiar with his stock and fixtures, and that the store, its contents and the business, were worth \$6,000 December 10, 1897, and would have sold for that amount. He says there was a sign over the cash register, and that one was put in the perfume case a week or two after the transfer.

W. J. Hessler testified that he began to work for Gaul as drug clerk, in August, 1897, and so continued until April 30, 1898; that he went on duty at 6:30 o'clock A. M., and worked till ten o'clock P. M., being absent from duty during that time only about fifteen minutes; that Gaul told him of the transfer the next day after it occurred; that about a week after the transfer there was a sign put over the cash register, but that none was in the perfumery case, as he recollected, and that about three weeks after the transfer, a black sign about eighteen inches long and six inches wide, was placed outside; that on the sign in red or pink letters was, "H. Best, successor to," and underneath was Gaul's sign; that he saw Best in the store only three or four times between December 10, 1897, and April 30, 1898, and never saw him go behind the counter but once, and never saw him examine the cash register; that Gaul was the manager, and so continued till witness left; that he took the cash from the register, paid the help, kept the same books he used before the transfer, made out bills to customers on his own bill heads, none being printed in Best's name, and used his, Gaul's, own labels. "Gaul told me Best had nothing to do with paying the men. When I was going to leave he said if I left without notifying him, he would not pay me, and I went to Best, who told me to go to Gaul and get my money. Gaul afterward asked me why I went to Best, and I said I thought I was working for Best. He said I was not, that Best had nothing to do with it; that I was working for him."

Arthur B. Jackson testified that June 30, 1898, he pur-

chased goods at the store, for which he paid, and a receipt was given him which was headed, "In account with Adolph Gaul."

Harrison C. Jackson testified that June 23, 1898, he purchased a bottle of glycerine at the store, on the label affixed to which was: "Adolph Gaul, Prescription Pharmacist, 657 North Clark St., S. W. corner North avenue, Chicago."

Appellee put in evidence a bill of sale from Gaul to Best, of date December, 1897, the day not specified. The bill of sale is absolute on its face, and is expressed to be subject to mortgages on the soda fountain and cash register. It includes all personal property of every description in the store and the basement under the store.

Gaul testified that he was a medical student, and that while managing the store he left home to attend the medical college on Mondays, Tuesdays and Wednesdays at 8:45 o'clock A. M., on Fridays at ten o'clock A. M., and on Saturdays at eight o'clock A. M., and returned sometimes at five, sometimes at six and sometimes at seven o'clock P. M., and that the salary he received as manager was \$75 per month. He testified that the day before the sale to Best, the latter came to him and said:

"I hear that you are in a pretty bad fix." I said, "Yes." He said, 'I want some security for my money, or else I want the money.' He told me he wanted the money or ample security. I said, 'All I have is the store.' He said he understood I owed the landlord; I said I owed him \$2,000, and I didn't think the store would bring \$1,500; that, under favorable circumstances it might bring \$5,000 if not taken out."

The witness further testified that Best was determined; would not give him any time, and that all he, witness, could do was to give him the store to secure his indebtedness to him. Witness also testified that signs were put over the cash register, in the perfumery case, and over the door, and that on the inside signs were the words, "Henry Best, successor to Adolph Gaul." What was on the outside sign he does not say.

John J. Johnson testified that he negotiated for the purchase of the store altogether with Gaul, and that the only time he saw Best in connection with the purchase was when the bill of sale was given and the deal closed; that the sale to him was made August 30, 1898, and the consideration was \$8,000, \$2,000 of which was paid in cash and the balance in 15,000 shares of gold mining stock of the par value of \$1 per share. He said the mine was being operated and he considered the stock valuable and a good investment, but did not know the market value and could not say that it was worth \$6,000. He also testified that he executed a chattel mortgage on the stock to William G. King, to secure payment of about \$2,000.

Gaul testified that the stock and fixtures were worth \$1,730 December 9, 1897. The testimony of this witness, and also of Best, show clearly that Best exercised no more control over the store or business after than before the transfer; that, in fact, he exercised no control; also that the bill of sale from Gaul to Best was given merely as security for the indebtedness of the former to the latter. Best's admissions to Pierce and Lane, which stand uncontradicted, show that it was the understanding, at the time of the alleged sale to Best, that Gaul would be continued as manager, in order that he might, by drawing a salary as such, be supported while pursuing his medical studies, and not be entirely dependent on Best, his father-in-law, for support. Best does not deny having made the statements and admissions testified to by Pierce and Lane, but merely says his memory is failing considerably and that he don't recollect having made them.

Best testified that it was security he wanted. He was questioned and answered as follows:

Q. "You didn't like to see Mr. Gaul thrown out on the street?" A. "No, sir."

Q. "You wanted, in other words, to secure yourself and give Mr. Gaul some employment, did you not?" A. "Yes, sir, as long as I had the store. I wanted to get rid of the store. I ain't no druggist; I didn't know how to run a drug store."

There is no evidence that Best assumed to pay any part of the back rent as part of the consideration of the sale to him.

"A conveyance of property which is absolute on its face, but which is really intended as a mortgage or security, is well enough as between the parties, but the settled doctrine is, that such a transfer of property is fraudulent and void as to creditors." *Beidler v. Crane et al.*, 135 Ill. 92, 98.

The reason given for the doctrine is that in such case there is necessarily a secret trust for the benefit of the vendor, and that the natural and necessary effect of the instrument, in not disclosing the trust, is to mislead, deceive and defraud creditors. *Ib.*

That Gaul executed the bill of sale as security is proved by his own testimony. He testified: "There wasn't anything left for me to do but to sell him the store to secure my indebtedness to him." What Best wanted was his money or security, and Best's statements to Pierce, which are not denied, show conclusively that he regarded the bill of sale as merely a security. Else how could he say to Pierce that he was an honest man, and all he wanted was the \$2,300; that Gaul told him the store was worth \$8,000; that he thought it worth \$6,000, and that, if he could sell it for that amount, he wanted to pay all creditors. And why did he state to Lane that he had no disposition to beat any one, and that he believed if the store should be held until summer and then sold, all Gaul's creditors would be paid? This language would be appropriate coming from one who held the property in trust for creditors, but would be not only inappropriate, but absurd, if used by a purchaser of the property absolutely and in good faith.

We are of opinion, from the evidence, that the actual intention of the parties was to hinder and delay creditors other than Best, and that the bill was made for that purpose, and to secure Gaul's indebtedness to Best. The evidence shows clearly that Best knew that Gaul had other creditors; that the property in the store was all Gaul had; that he was in a "bad fix." He also believed, as he himself

says, that the property was worth \$6,000, and he, as well as Gaul, must have known, on the hypothesis that they were moderately endowed with common sense, that for Best to take an absolute deed of the property merely as security, and continue the business with Gaul as manager, would necessarily hinder and delay Gaul's other creditors. Gaul testified that at the time of the execution of the bill of sale he knew that it would delay appellant in the collection of its debt.

The consideration for the alleged purchase was grossly inadequate, if the bill of sale is to be regarded as absolute in fact, and not merely as a security.

Best only claims that Gaul owed him \$2,300. The evidence is overwhelming that the property, when the bill of sale was executed, was worth net between \$5,000 and \$6,000. Gaul, the only witness for appellees as to value, testified that it was worth only \$1,730, but we do not think his evidence entitled to much credit. Gaul testified that he told Best, before the transfer, that under favorable circumstances the store might bring \$5,000, and Best told Pierce that Gaul told him it was worth \$8,000, and his testimony, in other particulars, is inconsistent with his statement that the property was worth only \$1,730.

"A vendee who purchases the property of an insolvent debtor for less than its value, thereby deprives the creditors of the difference, and defeats their just expectations." Bump on Fraudulent Conveyances (3d Ed.), p. 44; see also *Dodson v. Cooper*, 50 Kan. 680, and *Mobile Savings Bank v. McDonnell*, 89 Ala. 434.

"Insolvency means a general inability to answer, in the course of business, the liabilities existing and capable of being enforced." *Brouwer v. Harbeck*, 9 N. Y. 589, 593, and cases cited.

That such inability existed in Gaul's case was fully proved.

But in addition to the sale having been made as security to Best, and to hinder and delay creditors, the evidence tends strongly to show that another object was to secure a benefit or advantage to Gaul. Best testified that he wanted

to secure himself and give Gaul some employment, so long as he had the store; that Gaul had no income except what he had from the store. The only objection that Best made when Pierce, appellant's representative, suggested to him to turn the store over to appellant, and that he should first be paid from the proceeds of the business, was, that it would throw Gaul out of employment; that if Gaul could not stay there and run the store, he would be on his, Best's, hands with his family, and he would have to take care of him. Best also stated to Pierce and Lane that, at the time of the transfer, it was understood that Gaul should continue as manager of the store. Gaul was retained in the store as manager, and was paid, or rather paid himself, \$75 per month for what he could do before business hours in the morning and after five, six or seven o'clock in the evening, which is certainly a very suspicious circumstance. A secret understanding or agreement between the parties to a sale for a benefit to accrue or be reserved to the vendor, the conveyance being absolute in terms, is a fraud as to creditors of the vendor. *Moore v. Wood*, 100 Ill. 451, and cases cited.

Appellant's counsel contends that there was no such change in the possession of the property as the law requires, and we are inclined to that view. In *Martin v. Duncan*, 156 Ill. 274, certain property was attached as the property of the defendant in error, George W. Duncan. The goods were claimed by Robert Duncan, a brother of George. The attachment was levied May 28, 1891, and on the 16th of that month George had executed to his brother Robert a bill of sale of the goods. The court thus states the case:

"George W. Duncan, against whom the suit was brought, lived in Dixon, and had two stores, one in Dixon and one in Ottawa. His brother, Robert Duncan, the defendant in error, lived in Ottawa and managed the store in the latter place from September, 1888, down to May 16, 1891, when the transfer hereinafter mentioned is alleged to have been made. The defendant in error, in the management of the Ottawa store for his brother, George, sold goods, handled the money, made deposits, paid for goods, paid bills by checks, took out insurance, had no clerk, kept such books



as were kept, and had an agreement that he was to receive for his services \$25 per month and his board. George Duncan came to Ottawa only occasionally, although the store was run in his name and advertised as his, and the stock levied upon is conceded to have been his until May 16, 1891. Up to that date Robert Duncan was merely the agent and representative of his brother, George, and his possession was until then the possession of George."

The court say :

"Up to May 16th defendant in error had been in possession as agent for his brother, and if, on May 28th, he was in possession for himself, the change in the character of the possession should have been indicated by such outward, open, actual and visible signs as could be seen and known to the public, or persons dealing with the goods. (Clafin v. Rosenberg, 42 Mo. 439.) \* \* \* When the known and previously recognized agent of an alleged vendor remains in possession, the appearance to the world is the same as though the vendor himself remained in possession, unless there are substantial and visible signs of a change of title."

In the present case Gaul, who, prior to the execution of the bill of sale, was the owner, continued in possession and managed and controlled the business as he had done prior to the alleged sale, sold goods to the customers labeled "Adolph Gaul," and made out bills to customers headed, "In account with Adolph Gaul." He kept his accounts in the books formerly used by him. He retained in his employ Hessler, his former drug clerk, until April 30, 1898, nearly five months after the alleged sale, and told Hessler that Best had nothing to do with it, that he, Hessler, was working for him, and finally, sold the goods *en masse*, without any intervention on the part of Best, except that the latter signed the bill of sale. Best says that he left the whole matter of the sale to Johnson, including agreement as to consideration, to Gaul. The formal signing of the bill of sale to Johnson was substantially the sole act of Best in relation to the property, after the alleged sale from Gaul to him. Concisely stated, Gaul acted in all respects as if he were the sole owner of the store, and Best as if he had no pecuniary interest in it. Gaul testified that Best had no

key to the store, and was ignorant of the combination of the safe.

Counsel for appellees relies on the signs as indicating a change of ownership. It may be true that the card sign over the cash register, the one in the perfumery case, and the small one on the front door with the words, "Henry Best, successor to," on it, placed over the former sign of Adolph Gaul, might indicate to one observing them that there had been a change in the business, but we think the effect of such signs more than counterbalanced by the manner in which the business was conducted; besides, the primary question is, was there in fact a change of possession from Gaul to Best, because if there was not, the signs were as deceptive as was the bill of sale.

There is no evidence that Johnson, at the time he purchased the property, had any knowledge of the circumstances under which the alleged sale to Best was made, or that his purchase was not in good faith. This being true, and appellee Best having received the proceeds of the sale of property worth between \$5,000 and \$6,000, appellant is entitled to a personal decree against Best. *Coale v. Moline Plow Co.*, 134 Ill. 350, 358.

The judgment will be reversed and the cause remanded, with directions to enter a personal decree in favor of appellant, the Fuller & Fuller Company, and against appellee Henry Best, for the sum of \$1,440.51, with interest at the rate of five per cent per annum from January 5, 1893, till the date of the decree.

Reversed and remanded with directions.

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**David E. Town v. Belle E. Alexander, William T. Miller,  
Martha J. Boardman et al.**

1. **PARTIES**—*In Foreclosure Suits.*—The holder of the indebtedness secured is a proper party to file a bill to foreclose a trust deed.

2. **SOLICITOR'S FEES**—*In Foreclosure Suits.*—Where a trust deed makes provision for a solicitor's fee the object of the provision is to pro-

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vide for such fees in case the grantor fails to pay the debt, and the liability remains the same, whether the bill to foreclose is filed in the name of the trustee or of the holder of the notes.

8. *EQUITY PRACTICE—Foreclosure of Prior Mortgage on Cross-bill.*—A junior mortgagee can not, by filing a bill to foreclose his mortgage, compel the foreclosure of a prior mortgage, but the holder of such mortgage may answer and file a cross-bill to foreclose the prior mortgage.

4. *APPELLATE COURT PRACTICE—Statutory Damages on Affirmance.*—Where an appeal or writ of error is prosecuted only for delay, a motion to affirm the judgment or decree, with statutory damages, is proper.

5. *SAME—Statutory Provisions.*—Section 27, Chapter 87, R. S., provides that the process, practice and pleadings in the Appellate Court shall be the same as is prescribed, or which may hereafter be prescribed, for the Supreme Court, so far as applicable.

**Foreclosure of a Trust Deed.**—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed, with statutory damages, Mr. Justice SHEPARD not concurring in the award of damages. Opinion filed November 21, 1899.

CHARLES PICKLER, attorney for appellant.

J. L. RAY, attorney for appellee Miller; S. S. PAGE, of counsel.

GEORGE W. MILLER, attorney for appellee Alexander.

JAMES R. MANN, attorney for appellee Boardman.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This is a decree entered upon a bill and a cross-bill filed, respectively, to foreclose certain trust deeds in the nature of mortgages. The appellant is the grantee of the mortgaged premises.

The original bill filed was by the appellee Belle E. Alexander, the holder of the notes secured by the trust deed which she sought to foreclose.

That trust deed covered the whole of a certain lot numbered fourteen, the east fifty feet of which, it was specifically averred by the bill, was covered by a prior trust deed to secure \$10,000. Neither the holder of the note secured by the prior trust deed, nor the trustee thereunder, was

made a party to the original bill, nor was it necessary that either of them should be. The appellee Martha J. Boardman was the holder of the note secured by the prior trust deed, and she came into the original suit as a defendant, and answered the bill, and filed a cross-bill to foreclose such prior trust deed.

The decree was in accordance with the prayers of the bill and cross-bill.

The argument of appellant is directed to four propositions, viz., (1) that because of the provision in each trust deed—that in case of default, a bill to foreclose might be filed in the name of the trustee—and no provision being made that the holder of the notes might file such bill, it was error to sustain either bill in the name of the note holder; and (2) that the bills not being filed in the name of the trustees there is no authority for the allowance of solicitor's fees; and (3) that a solicitor's fee for filing the Boardman trust deed was not allowable, because all the relief sought thereby could have been had under Boardman's answer to the original bill; and (4) that the amount of the solicitor's fee under the Boardman cross-bill is unreasonable.

We will not stop to cite authority that the holder of the indebtedness secured by a trust deed is a proper party to bring a bill to foreclose the trust deed—a practice that has been sanctioned ever since the question was first raised.

As to the second proposition, the case of *Cheltenham, etc., v. Whitehead*, 128 Ill. 279, is conclusive. The trust deed in that case, as in this one, made express provision for a solicitor's fee in case of the bill being filed in the name of the trustee, or otherwise, and the bill there was filed by the holder of the note. The court held that the object of the provision was to provide for solicitor's fees in case the mortgagor should fail to pay the debt and the holder of the indebtedness should be compelled to foreclose in order to collect the debt, and that the liability of the mortgagor for solicitor's fees was in no manner changed, whether the bill was filed in the name of the trustee or of the note holder.

Upon the third proposition, it must be borne in mind that the Boardman trust deed constituted a lien upon a portion of the premises prior to the one to foreclose which the original bill was filed. It was so admitted to be by the allegations of the original bill. It is well understood that a junior mortgagee can not, by filing a bill to foreclose his mortgage, compel the foreclosure of a prior mortgage. So here, the prior mortgage not being subject to foreclosure under the original bill, it was proper, when the holder of the prior mortgage came into the original suit and answered and filed her cross-bill to foreclose the prior mortgage, that solicitor's fees should be allowed. *Shaffner v. Appleman*, 70 Ill. App. 684; same case, 170 Ill. 281.

The additional contention, that the amount allowed for solicitor's fees under the Boardman cross-bill was unreasonable, can not be sustained. The trust deed expressly stipulated the sum that was allowed, and it was testified by a practicing lawyer, who was called as a witness for appellee, that such sum was less than the ordinary, usual and customary fee. No evidence to the contrary was offered. *Dorn v. Ross*, 177 Ill. 225.

So far as appears, the decree is right in every respect.

The appellees Alexander and Boardman have, respectively, moved to have the decree affirmed, with statutory damages of ten per centum upon the amount found to be due them, respectively, or so much thereof as this court may deem to be reasonable and just, upon the ground that the appeal has been taken only for delay. A majority of the court are of the opinion that the motion is well founded, and should be granted, for the following reasons:

The points presented by appellant and urged as reasons for reversal are without merit, as has been heretofore expressly decided before this appeal was taken. It is a waste of time to compel this court to restate and reaffirm decisions which should, at least, have been considered by appellant's counsel before he filed his brief or perfected his appeal. By the provisions of Rev. Stat., Chap. 33, Sec. 23, relating to costs, ten per centum on the amount of the judgment or decree appealed from may be decreed to the

appellant upon affirmance, "provided the Supreme Court shall be of opinion that such appeal or writ of error was prosecuted only for delay."

The Appellate Court act (Sec. 27, Chap. 37, Rev. Stat.) provides that the process, practice and pleadings in the Appellate Court "shall be the same as the process, practice and pleadings now prescribed, or which may hereafter be prescribed, in and for the Supreme Court," so far as applicable. It has been held that Secs. 23 and 24, Chap. 33, Rev. Statutes, in relation to costs, entitle an appellee to damages where the appeal appears to have been only for delay. *Neagle v. Dawson*, 64 Ill. App. 538-9.

We are compelled to regard the appeal in this case as prosecuted for delay. The decree of the Superior Court will therefore be affirmed, and judgment entered against appellant in favor of appellees Alexander and Boardman, respectively, for two and a half per centum on the amount found due by the decree to said appellees, respectively, excluding solicitor's fees.

The writer of the opinion upon the main question, considers Sec. 23, Chap. 33, Rev. Stat., above referred to, as penal in its character (*Hamburger v. Glover*, 157 Ill. 521), and because it is penal in character, entertains so much doubt of the power there conferred upon the Supreme Court having been extended to the Appellate Court by the other acts referred to, that he does not concur with the majority of the court in awarding damages to appellees. Affirmed, with statutory damages.

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**Harriet A. Dorn v. Robert Smith, Trustee, and George Newkirk.**

1. **EQUITY PRACTICE—*Answers Not Filed in Time.***—An answer in a chancery proceeding not filed within the time limited by the court, and not until after notification for a default and reference to a master had been served, will be stricken from the files.

2. **APPELLATE COURT PRACTICE—*Statutory Damages to be Allowed***

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*only When Moved for.*—Where no claim is made or motion presented for statutory damages, when an appeal is taken for delay, such damages can not be awarded.

3. STATUTES—*Construction of Section 23, Chapter 33, R. S.—Costs.*—Sec. 23, Chap. 33, R. S., providing that if a judgment or decree be affirmed in the whole on error or appeal, the party prosecuting the writ of error or appeal shall pay to the opposite party a sum not exceeding ten per centum of the amount of the judgment or decree, in the discretion of the court, and have judgment and execution therefor, etc., is applicable to the Appellate as well as to the Supreme Court.

**Bill to Foreclose a Trust Deed** (three cases consolidated). Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Mr. Justice HORTON not concurring in that part of the opinion awarding statutory damages, etc. Opinion filed November 21, 1899.

CHARLES PICKLER, attorney for plaintiff.

J. S. SCOVEL, attorney for appellees.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

In this case a bill in chancery was filed by appellees July 14, 1897, to foreclose a trust deed given by appellant to secure the payment of two promissory notes made by her for the principal sum of \$250 each. February 23, 1898, it was ordered by the court that the demurrer filed by appellant to said bill of complaint be overruled, and that appellant answer said bill within twenty days from that date. May 2, 1898, appellant filed what is called an answer. It simply denies the execution of the notes and trust deed—is not verified—and denies that appellee is entitled to the relief prayed. There are seven lines in this answer.

May 3, 1898, it was ordered by the court that said answer be stricken from the files because it had not been filed within the time limited by the court and not "until a notification for a default, and for a reference to a master in chancery had been served."

Afterward, and on said third day of May, the default of all the defendants was entered, and the cause referred to a master to take proofs and report the same with his conclusions. Upon the hearing before the master the solicitor for appellant ostensibly appeared for Mr. Town, who is apparently only a nominal defendant. Upon the coming in of the master's report objections thereto were filed by the same solicitor for all of the defendants, which were very properly overruled, and a decree entered July 12, 1898. No error is assigned in this court for the overruling of same.

The only errors assigned are that the trial court erred in striking said answer from the files and entering default, and in entering decree upon the bill taken as confessed.

The so-called "brief and argument" filed in this court is less than two pages, including what we assume is intended to be taken as a statement of facts. The only thing which justifies calling it a "brief" is its brevity, and it contains no "argument" other than the use of the word. No points are made and no reference is made to the alleged errors assigned. Neither is there a single authority cited or referred to. The decree of the Superior Court will be affirmed.

Said notes were given to secure the payment of a part of the purchase money due for the property described in said trust deed and said decree. Said notes are dated August 2, 1890. No interest was ever paid upon either of them; hence, nearly eight years' interest is included in said decree. It also appears that the holder of said notes has paid special assessments and the taxes upon said premises all the time since said trust deed and notes were made. There is nothing in the record tending to show that appellant has any legal or equitable defense to the claim of the holder of said notes, nor is there any pretense in the so-called "brief and argument" that there is any such defense or any legal or equitable ground for this appeal. A year elapsed between the time of filing the bill and the entry of the decree. And the so-called "abstract of record" is trifling. A record of over thirty pages is condensed into a little over two pages.



Twelve pages of the record are omitted entirely at one jump.

Every ear-mark indicates trifling with the courts, and tends to show that this appeal is for delay, and for that purpose only.

The court is unanimous in the conclusion that the appeal in each of the above entitled causes is prosecuted only for delay, and that each of said decrees should be affirmed.

No claim is made or motion presented by appellees asking that statutory damages be allowed. A majority of the court are of the opinion that because not asked by appellee such damages should not be awarded.

Sec. 23, Chap. 33, Rev. Stat. of Ill., entitled "Costs," is as follows :

"In every such case, if the judgment or decree be affirmed in the whole, the party prosecuting such writ of error or appeal shall pay to the opposite party a sum not exceeding ten per cent of the amount of the judgment or decree so attempted to be reversed, at the discretion of the court, and in addition to the costs shall have judgment and execution therefor; provided, the Supreme Court shall be of opinion that such appeal or writ of error was prosecuted for delay."

A majority of the court are of opinion that this statute, which was originally passed long prior to the statute creating this court, is now applicable to this court as well as to the Supreme Court.

The writer is unable to concur in the opinion of the majority that this court should not award statutory damages for the reason that the court is not asked so to do by the appellees in these particular cases.

The section of the statute above quoted is penal in its character. (*Hamburger Co. v. Glover*, 157 Ill. 521.) True, the statute says that "the party presenting such writ of error or appeal shall pay to the opposite party a sum not exceeding," etc.

The character of the statute is not changed for the reason that "the opposite party" mentioned therein does not ask the court to enforce it. It is still a statute "penal in its

character." Upon whom does the duty rest of seeing that statutes of this character are enforced, if not upon the courts?

But this court is requested by attorneys having other cases upon the docket to enforce this statute. These particular cases are pointed out by the attorneys making such request.

With that section of the statute in full force, and in the crowded condition of the docket of this court, a duty rests upon this court in this matter, at this time, with special weight. That duty is to the public generally, and to the legal profession, as well as to litigants. Members of the legal profession, representing parties with cases pending upon the docket of this court, request the court simply to do its duty.

Delay is sometimes, indeed it is quite frequently, a denial of justice. If the docket of this court is to be incumbered with such cases as these, and this court fails to do its duty in the premises, when requested to do so by persons interested in having the docket unincumbered, litigants have a right to feel aggrieved. As re-affirmed in the Constitution of this State, every person ought to obtain, by law, right and justice "promptly and without delay." It should not be the fact that a person so situated as to be able to give bonds and thus perfect an appeal, may do so, when it is done only for delay, the result of which may be to ruin the other party to the litigation, because he is thus deprived of his just dues. It was no doubt, in part at least, to prevent such proceedings and to empower the courts to require compensation to be made up to a fixed limit, that the legislature adopted said Sec. 23 and Sec. 73, Ch. 110 of the Rev. Statutes.

In *Hamburger Co. v. Glover*, *supra* (157 Ill. 521), the Supreme Court, while holding that damages should not in that case be allowed under said Sec. 73, Ch. 110, says that "If the appeal or writ of error were prosecuted for delay, damages are recoverable at the discretion of the court, under Sec. 23, Ch. 33, of the statute." That was a bill in chancery to foreclose a mortgage.

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In *Dorn v. Ross*, 177 Ill. 225, 228, also a case of a bill to foreclose, the Supreme Court clearly intimates that statutory damages may be allowed under said Sec. 23, in a foreclosure proceeding, but holding that in that case it did not sufficiently appear that the appeal was for delay only.

This court was established to aid and relieve the Supreme Court in the final disposition of suits. The docket of that court had become so congested that it was impossible for the court to do justice to itself and to litigants, and promptly dispose of the cases brought before it. For the same reason that the legislature adopted said Secs. 23 and 73, it established this court; that is, to prevent delays in the administration of justice. This court was not established as a way station on the road to the Supreme Court, or to add to the delay and expense of litigation. The writer is of opinion that this court is, under the statute, authorized to exercise the power nominally reposed in the Supreme Court by said Sec. 23. Sec. 24 of the same chapter provides that "where a judgment or decree shall be reversed in part and affirmed in part, the costs shall be apportioned between the parties, according to the discretion of the Supreme Court." It is believed that this section of the statute has been acted upon, not infrequently, by the Appellate Courts of this State. Why should such Appellate Courts act under one section and not under the other?

Not only should the decree of the Superior Court be affirmed, but judgment for statutory damages should also be entered. But as stated, a majority of the court are not in favor of entering such judgment.

The decree of the Superior Court in each of said cases is affirmed.

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**Gay Dorn v. Philip Geuder, Executor of Johann Geuder,  
and Edward S. Dreyer, Trustee.**

1. *EQUITY PRACTICE—Right of a Complainant to Dismiss his Bill.*—A complainant may dismiss his bill at any time before decree, when no cross-bill has been filed.

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2. *SAME*.—*What Takes from a Complainant the Right to Dismiss His Bill.*—It is the filing of a cross-bill, not this or that kind of an answer, which, under the statute, takes from the complainant the right to dismiss his bill.

**BILL in Equity.**—Appeal from an order dismissing, on complainant's motion, his bill entered by the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed November 21, 1899.

CHARLES PICKLER, attorney for appellant.

LACKNER, BUTZ & MILLER, attorneys for appellees.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is an appeal from an order dismissing, on complainant's motion, a bill filed by appellees to foreclose a trust deed.

Appellant's counsel states that "the only point involved is whether the allegations by Dorn, in his answer setting up his damage, constitute a cross-bill."

The answer is entitled, "The separate answer of Gay Dorn, one of the defendants to the bill of complaint of complainants," and in effect sets forth that the filing of the bill to foreclose had damaged said defendant in various ways, impairing his credit and financial standing, and asks the court to award him damages therefor and solicitor's fees.

The answer concludes as follows: Defendant "denies that complainants are entitled to the relief, or any part thereof in said bill of complaint demanded, and prays the same advantage of this answer as if he had pleaded or demurred to said bill of complaint, and prays to be hence dismissed with his reasonable costs and charges, in this behalf most wrongfully sustained," etc.

It is contended that appellees had no right to dismiss the bill without the consent of appellant, in view of the relief prayed for by the latter in his answer, which he claims constituted it a cross-bill.

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No authorities are cited and no reasons advanced in support of appellant's claim that this answer constituted, and is to be regarded as a cross-bill. His counsel contents himself with merely stating that the bill ought not to have been dismissed, apparently assuming that it is not his duty "to reason why."

Nearly three years before the dismissal appellees filed a replication to appellant's answer. If the latter had then considered it as a cross-bill, he could and should have taken steps to require appellees to "except, plead, demur or answer to such cross-bill" in the manner required by the chancery act. (Sec. 32, Chap. 22, Rev. Stat.) This was never done. It was apparently treated as an answer until after appellees had on their own motion caused their bill to be dismissed. "It is the filing of a cross-bill, not this or that kind of an answer, which, under the statute, will take from the complainant the right to dismiss his bill before decree rendered, and this alone." *Purdy v. Henslee*, 97 Ill. 369, 392. (Sec. 36, Chap. 22, Rev. Stat.) The answer in this case has none of the features of a bill in chancery, and was not treated as such by any of the parties. It has been held, in general terms, that a court has no power to decree affirmative relief on an answer; and that it is the duty of a party who files a cross-bill to take steps to have it answered, and where this is not done and the parties voluntarily go to a hearing the cross-bill may be regarded as abandoned. *Purdy v. Henslee*, *supra*, and cases there cited.

The bill in the present case was dismissed on complainant's motion at complainant's costs, without prejudice. It has been frequently held that the complainant may dismiss his bill at any time before decree, when no cross-bill has been filed. *Langlois v. Matthiessen*, 155 Ill. 230, and cases there cited.

We find no error in the order of the Circuit Court dismissing the bill, and it must be affirmed.

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**Chicago City Ry. Co. v. Adam Mager.**

1. **INSTRUCTIONS**—*Technical, Not a Reversible Error.*—To refuse to instruct the jury that in considering the evidence of the witnesses and determining what weight shall be attached to the same, they have the right to take into consideration whatever interest, if any appears from the evidence, such witness or witnesses may have in the result of the suit, is a technical but not a reversible error, where the point is not covered by other instructions given.

**Action in Case, for personal injuries.** Appeal from the Circuit Court of Cook County; the Hon. JOHN C. GARVER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1899. Affirmed conditionally. Opinion filed November 22, 1899.

WM. J. HYNES and W. J. FERRY, attorneys for appellant;  
MASON B. STARRING, of counsel.

W. B. MOAK, attorney for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This is an action to recover damages for personal injuries. Attorneys for appellant state very concisely what they claim, as follows:

"1. That the verdict is not supported by the evidence.

"2. That the trial judge erred in his rulings on the instructions.

"3 That the verdict is excessive."

First. Upon an examination of the testimony we are not able to say that it is so clear and convincing that fair-minded persons might not honestly differ upon the questions of whether the appellee failed to exercise ordinary care and whether the motoneer of appellant was guilty of negligence. It is not for us to say whether we should have arrived at the same conclusion that the jury did. But the verdict is not so clearly against the weight of evidence as to warrant this court in setting it aside.

Second. As to the instructions: Attorneys for appel-

lant asked the court to give twenty-six instructions. Of those the court gave twenty as asked, modified one and gave it as modified, and refused five. The court also gave one instruction prepared by the trial judge, and two asked by appellee. There was a sufficient number of instructions to confuse an ordinary jury. It is difficult to conceive a case where all the rules of law necessary to aid a jury in arriving at a just verdict might not be stated in much less space. The recent practice in this class of cases seems to be on the part of the plaintiff to ask no instructions whatever, because of the fear that some error may creep in, and on the part of the defendant to ask a great number of instructions in the hope that some error may occur in modifying or refusing them.

The 23d instruction asked by appellant is as follows :

"The jury are instructed that in considering the evidence of the witnesses in this case, and determining what weight shall be attached to the same, they have the right to take into consideration whatever interest, if any appears from the evidence, such witness or witnesses may have in the result of the suit."

That instruction the court refused to give. The point presented by it is not covered by any of the instructions which were given. It is quoted in full in appellant's brief and printed there in italics, and the objections thereto urged. In the brief for appellee this instruction is not mentioned or referred to. Whether the attorney for appellee meant thus to concede that it should have been given, we do not assume to say. That instruction is correct and the refusal to give it was technically an error.

As to the other instructions there was no substantial error under the facts and circumstances of this case.

Third. Was the verdict excessive? We think it was. No good purpose will be served by an extended review of the testimony upon this question. It would not be a precedent to guide in the trial of other cases. We therefore simply express our conclusion.

The testimony of some of the witnesses is incredible. How far the jury might have been affected by said 23d

instruction, if it had been given, can not be determined. As stated, said 23d instruction should have been given. But the refusal to give it is not such an error as will justify a reversal of the judgment in case a remittitur is entered as here indicated.

If the appellant shall within ten days formally remit the sum of \$1,000 the judgment of the Circuit Court will be affirmed; otherwise that judgment will be reversed and the cause remanded. Affirmed if remittitur made; if not, reversed and remanded.

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### General Electric Ry. Co. v. Richard P. Leahy.

1. PRACTICE—*Filing Affidavits of Claims—Discretion.*—To allow an affidavit of claim to be filed as a suit is about to be reached for trial, and which would materially change the issues to be tried, without good cause shown to the court, would be an improvident exercise of discretion.

Assumpsit, on two drafts. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1899. Affirmed. Opinion filed November 21, 1899.

JUDD & HAWLEY, attorneys for appellant.

TENNEY, McCONNELL, COFFEEN & HARDING, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is a suit in assumpsit brought upon two drafts drawn upon the appellant, bearing upon their faces what purport to be the appellant's acceptance, signed as follows: upon one draft, "General Electric Railway Company, Lucius Clark, Gen'l Manager;" upon the other, the same form of signature, except that the words "by Stinson" are added after the word "manager."

The declaration contained special counts upon the drafts,



and also the common counts. An affidavit in the usual form is attached, stating the demand of the plaintiff and the amount claimed to be due. To this the defendant filed a general demurrer, upon what ground does not appear. Later, appellant pleaded the general issue, to which was attached an affidavit of merits.

The case was soon after placed, upon application of appellee's counsel, on the short cause calendar. When reached it was three times postponed upon the ground that one of appellant's counsel was ill, and was finally placed upon the regular calendar by agreement, and called for trial March 8th, after a delay of more than a month.

March 5th, three days before the case was reached for trial, appellant's attorneys moved for leave to file an affidavit to verify the plea of general issue, by stating "that the plea of the general issue heretofore filed in this cause is true."

Appellant claims to have sought leave to file this affidavit in order to place the burden of proving the execution of the acceptances and the authority of Clark upon the appellee, and to enable it to deny the agency of Clark, in accordance with the provisions of Sec. 34, Chap. 110, of the Revised Statutes. The bill of exceptions recites that on the 5th of March, when said motion was made, the case was about to be called for trial; that it was made to appear to the court that the filing of such affidavit would materially change the issues, and might necessitate the taking of depositions of non-resident witnesses by the plaintiff, thus requiring a continuance of the cause.

It appears that this affidavit, seeking to verify the plea of general issue, was sworn to February 23d, but no motion was made for leave to file it until ten days afterward, when granting the motion might have resulted in continuing the case. Moreover, the plaintiff then and there offered to stipulate that the defendant might introduce, under the general issue, evidence tending to disprove the authority of Clark to execute the acceptances sued on. Appellant refused this offer, which would have permitted it to make

the defense of which it claims to have been deprived; but it was willing to have the cause *passed* and the trial further delayed until appellee could take depositions to prove his case under the change in the pleadings. The court refused appellant leave to file the additional affidavit upon the ground that the motion came too late.

We think the discretion of the trial court was properly exercised. The court was abundantly justified by this record in concluding that appellant was seeking only for delay. "It would doubtless be an improvident exercise of discretion in a court to allow an affidavit of claim to be filed at a stage of the case so late as here shown, without good cause brought to the knowledge of the court in support of the motion." *Spradling v. Russell*, 100 Ill. 522.

The above language of the Supreme Court is applicable to the affidavit before us. The record fails to show that any good cause for granting the motion was shown.

The judgment of the Superior Court is affirmed.

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**John D. McRae and William M. McRae v. Maryette C. Adams.**

1. *PRACTICE—Discretion in Setting Aside Defaults.*—Setting a default aside is a matter of discretion with the trial court, and a court of review will rarely interfere with the exercise of such discretion.

**Action in Case, for loss of baggage.** Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed November 21, 1899.

CRATTY, JARVIS & CLEVELAND, attorneys for appellants.

MORAN, KRAUS & MAYER, attorneys for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This is an action on the case brought by appellee to

recover from appellant the value of a certain telescope satchel and contents. Appellants were common carriers of goods for hire. February 24, 1898, appellee delivered said telescope to them to be by them carried, and it was taken or stolen from their delivery wagon and lost without the fault of appellee.

Appellants were personally served with summons and the declaration filed in apt time for the April term of the Circuit Court, which begun April 18, 1893. April 25th default and judgment were entered. April 29th appellants gave notice of a motion to vacate said judgment. May 14th said motion was denied, and it is from the order denying said motion that this appeal is prosecuted.

From the affidavit of appellant John D. McRae, filed in support of said motion, it appears that he had a conversation with Mr. Jarvis, one of the attorneys for appellants in the matter of this appeal, in regard to this suit. Such appellant states that he intended by such conversation to have said attorney understand that his firm should appear for and defend appellants in this suit. Mr. Jarvis, in his affidavit, states that a conversation occurred between himself and such appellant, but that his firm were not the regular attorneys for appellants; that he did not understand from such conversation that such appellant desired to have his firm appear for and defend appellants in this suit; and that therefore neither he nor his firm gave the matter any attention.

The rule is that setting aside a default is a matter of discretion with the trial court. A court of review will rarely interfere with the exercise of such discretion. The record in this case does not present such facts as would authorize this court to thus interfere. The affidavits do not show sufficient ground for setting aside the default and judgment.

The affidavit of G. W. Houdeshell, filed by appellants, shows that appellants are liable to appellee for the loss and that they have no valid defense. From said affidavit of appellant John D. McRae, it would seem that his contention is, not that appellants are not liable to appellee for the

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loss, but that he thinks the verdict and judgment, which are for the sum of \$295, should not be for more than \$200. The trial judge heard the testimony of the witnesses, and the affidavits as to the supposed value of the lost property were presented to him. We see no reason for interfering with his conclusion.

Perceiving no error in this record, the judgment of the Circuit Court is affirmed.

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### Western Plaster Works v. Patrick Lonergan.

1. **APPEALS—When to be Taken.**—The right to appeal is purely statutory, and Section 67 of the Practice Act requires that the appeal shall be prayed for and allowed at the term at which the judgment, order or decree was rendered. An appeal subsequently allowed and perfected gives the Appellate Court no jurisdiction to review the judgment.

2. **PRACTICE—In Taking Appeals.**—Where two defendants joined in a prayer for an appeal, which was allowed on condition that they enter into an appeal bond, etc., and only one of them executed the bond, the appeal may be dismissed on motion in the Appellate Court.

3. **SAME—Where Several Parties Pray an Appeal.**—Where several parties join in praying an appeal, and it is allowed on condition that they execute a bond, the condition must be literally complied with or the appeal will be defective as to those who do join in it.

**Action in Case, for personal injuries.** Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Appeal dismissed. Opinion filed November 21, 1899.

C. M. HARDY, attorney for appellant.

C. S. O'MEARA, attorney for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

A judgment was recovered against the appellant and one Gorman, jointly, in an action on the case, brought by appellee to recover damages for personal injuries alleged to have been sustained by him.

The judgment was entered March 5, 1898, and on the same day an appeal therefrom to this court was prayed by the defendants jointly, and was allowed upon the defendants filing "their appeal bond" in a certain sum within thirty days.

Eleven days later, on March 16, 1898, and within the same term, an appeal bond by the appellant alone was presented and approved. The order approving the bond recited that it was executed "in due form and in accordance with the order of this court, and within the time fixed by said order allowing an appeal," etc.

At a subsequent term, on October 5, 1898, the Western Plaster Works, appellant, moved the Circuit Court for and obtained an order amending the appeal order of March 5, 1898, so as to make the same read:

"Thereupon, the defendants having entered their exceptions herein, the defendant, the Western Plaster Works, prays an appeal, \* \* \* which is allowed upon filing herein its appeal bond \* \* \* within thirty days from this date."

Such amendatory order was not on its face a *nunc pro tunc* order, and no recitals, or evidence of any kind in support of the order, appears, from which it can by interpretation, construction or inference, be treated as in any way a correction of the order of March 5, 1898, or intended so to do. The bond that was filed March 16th was the only bond ever filed, and it must be held that it was filed under the order of March 5, 1898. The order of October 5, 1898, was a nullity in so far as its effect upon the appeal bond that was filed is concerned.

The right to appeal is purely statutory, and Section 67 of the Practice Act, under which provision is made for an appeal to this court, requires that the appeal "shall be prayed for and allowed at the term at which the judgment, order or decree was rendered." An appeal subsequently allowed and perfected gives this court no jurisdiction to review the judgment. *Guyer v. Wilson*, 139 Ill. 392.

So, in *Hileman v. Beale*, 115 Ill. 355, two defendants joined in a prayer for appeal, which was allowed upon con-

dition that they enter into an appeal bond, etc. One only of the defendants executed the bond. On motion the Appellate Court of the Fourth District dismissed the appeal, because both defendants did not unite in the bond, and the Supreme Court held the appeal was properly dismissed. See also *Tedrick v. Wells*, 152 Ill. 214; *Traders Safe & Trust Co. v. Calow*, 77 Ill. App. 146; *Robeson v. Lagow*, 73 Ill. App. 665.

The general rule is thus stated, in the last cited case :

"The rule is settled by an unbroken line of authorities that where parties \* \* \* join in praying an appeal, and it is allowed on condition that they execute a bond, the condition must be literally complied with or the appeal will be defective as to those who do join in it, and must be dismissed."

Appellant does not answer the motion to dismiss; but if it should be said that because the order approving the appeal bond recites that the bond was in accordance with the order allowing the appeal, such presumptions will be indulged in as will sustain the appeal. The answer must be that the record showing affirmatively that the bond was not in conformity with the order allowing the appeal, such mere recitals, having nothing to support them, can not prevail.

The marking of "O K" upon the bond, by counsel for appellee, can hardly be said to have any effect, except to signify to the trial judge the concurrence by counsel in the form of the bond and the sufficiency of the surety. *Traders Safe & Trust Co. v. Calow*, *supra*. And in this connection it may not be superfluous to add, although no point is made of it, that the bond filed is not the bond of the Western Plaster Works, but of one McCausland only.

The motion to dismiss the appeal must be allowed. Appeal dismissed.

**Chicago & E. I. R. R. Co. v. John A. Lowry.**

1. **PLEADING**—*Effect of a Plea Puis Darrien Continuance.*—By filing the plea of release *puis darrien* the general issue previously filed is waived and no evidence on the merits can be submitted on either side.

2. **SAME**—*Where a Plea Puis is Filed.*—Where a plea *puis darrien continuance* is filed in an action in case for personal injuries, the plaintiff is not required to show an affirmative case of negligence, or to show due care on his part, and the defendant is precluded from presenting evidence as to the merits of his defense.

3. **WAIVER**—*By Plea Puis Darrien Continuance.*—By filing plea *puis darrien continuance* after the general issue has been pleaded the latter plea is waived, and is by operation of law stricken from the record and is no longer in the case.

**Action in Case, for personal injuries.** Appeal from the Superior Court of Cook County, the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed November 21, 1899.

W. H. LYFORD, J. B. MANN and HAMILTON & STEVENSON,  
attorneys for appellant.

JAMES C. McSHANE, attorney for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

Appellee was in appellant's service as a switchman, and becoming injured in the course of such employment, brought this suit in case to recover his damages.

To the declaration appellant first pleaded the general issue of not guilty.

About a year afterward, appellant filed its plea *puis darrien continuance*, setting up a release, under seal, by appellee, of the several causes of action mentioned in the declaration, as of a date subsequent to the commencement of the suit.

Issue was joined upon the plea *puis* by replication and rejoinder.

Counsel for appellant say, in their brief:

"The errors relied upon arise out of the ruling with reference to the plea *puis darrien continuance*, the court hold-

ing that by filing the plea of release *puis darrien* the general issue was waived, and that no evidence on the merits could be submitted on either side, thus holding that plaintiff was not required to show an affirmative case of negligence, or to show due care on his part, and that defendant was precluded from presenting evidence as to the merits of its defense."

The ruling so complained of was right.

The recent case of Ripley v. Leverenz, 83 Ill. App. 603, decided by this court, is in point, and the authorities there referred to are conclusive. By filing the plea *puis darrien* appellant waived its former plea of the general issue, and it was by operation of law stricken from the record; it was no longer in the case, and it is immaterial whether, if it had stood, the release would have been admissible under it or not.

The only questions for the trial court, under the pleadings, were the effect of the release under the circumstances of its giving, and the amount of damages.

It is urged with much seriousness that the judgment should be reversed because of the remarks of appellee's counsel in his argument to the jury. The grounds in support of the motion for a new trial were specified in writing, and they did not include mention of any error by the court in such respect. O. O. & F. R. V. R. R. Co. v. McMath, 91 Ill. 104.

Nor is it assigned for error, here, that the trial court erred in overruling the motion for a new trial. It is, however, here assigned for error that the trial court erred in permitting improper remarks by appellee's counsel in presence of the jury, but it comes too late; and, besides, we may add, we fail to find that any exception was taken to the rulings of the court in such respects. Furthermore, a careful examination of all that the record contains in respect of such matters, fails to convince us that appellant was prejudiced by anything that was said, to an extent not amply cured by the remittitur made from the verdict in the court below.

The real issue tried was upon the truth of the matters set up in the replications to the plea of release, to wit:



"1. That prior to and at the time of the execution and delivery of said deed of release mentioned in said plea, defendant, through certain of its servants and authorized representatives in that behalf, intending to deceive and defraud plaintiff, caused plaintiff to become and be in such a state of intoxication that he, plaintiff, was unable to transact business, and was unable to appreciate and understand and did not appreciate or understand, the effect of said release.

2. That prior to and at the time of the execution and delivery of said deed of release in said plea mentioned he was so intoxicated that he was unable to appreciate or understand, and did not appreciate or understand, the nature or effect of said release, which facts plaintiff alleges the defendant well knew at the time of the execution and delivery of said release; yet defendant fraudulently obtained said deed of release from plaintiff under said circumstances.

3. That there was no consideration for the execution or delivery of said deed of release."

When the release was offered and received in evidence the burden of sustaining the truth of the matters set up in one or the other of said replications was cast upon the appellee. It would be valueless to recite the evidence. It was fully heard, and we discover no error in connection with its deliverance to the jury. It was absolutely conflicting and irreconcilable upon the question of appellee's condition—as to sobriety or gross drunkenness—and was peculiarly a question for the jury.

Upon behalf of appellant the court gave to the jury certain instructions upon the effect to be given to the release in connection with the drunken condition of appellee, as follows:

"If you believe from the evidence that at the time the plaintiff signed the release which has been introduced in evidence, he, the plaintiff, was mentally capable of understanding and did understand the nature of the transaction in which he was then engaged, you should find the defendant not guilty.

If you believe from the evidence that the plaintiff signed the release in question and received from the defendant, or its agent, the sum of money therein mentioned, then your verdict should be in favor of the defendant, though you may

believe from the evidence that the amount paid plaintiff was not a sufficient compensation for his injuries; unless you further believe from the preponderance of the evidence that the plaintiff at the time he signed said release and received said money was drunk to such a degree as to be deprived of the use of his reasoning faculties."

And at the instance of appellee an instruction was given upon the same subject, as follows:

"The court instructs the jury that if you believe, from the evidence and under the instructions, that before and at the time plaintiff signed the release introduced in evidence that he was so intoxicated that he was unable to, and did not appreciate or understand the purpose or effect of said release, and if you further believe from the evidence that the defendant through its authorized agents before and at the time said release was signed was fully aware of plaintiff's said intoxicated condition, and that defendant, through its authorized agents or servants, fraudulently took advantage of plaintiff's said condition, and with the intention of cheating and deceiving the plaintiff, caused and procured said release in question for a sum of money which was much less than the amount which he was entitled to, if you believe from the evidence he was entitled to anything, and that the amount which it paid for the release was much less than he was entitled to, then the plaintiff had the right to repudiate said release within a reasonable time after he became sober, and if you believe from the evidence that said release was so procured from the plaintiff under such circumstances and conditions, and that he did repudiate it within such reasonable time, then said release is no defense to this suit."

We do not observe any criticism by appellant upon the court's action concerning such or any other instruction, and so far, at least, as the appellant is concerned, we must assume that the jury were properly instructed upon the law of the case.

The case is, therefore, one where the evidence was irreconcilably conflicting, and the jury were properly instructed as to the law. Under such circumstances we are not at liberty to disturb a judgment.

Upon the whole record the judgment must be affirmed, and it is so ordered.

**Adolph Arnold et al. v. Edward Burgdorf.**

1. NOTICE—*A Question of Fact.*—As to whether a depositor in a banking firm had notice of a change in the proprietorship of the bank at or before making deposits is a question of fact, and should be submitted to the jury as such, under accurate instructions as to the law.

2. INSTRUCTIONS—*Requiring More than a Preponderance of the Evidence.*—An instruction which requires more than a preponderance of the evidence is erroneous.

**Assumpsit**, for money had, etc. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed if remittitur is entered, otherwise reversed and remanded. Opinion filed November 21, 1899.

ESCHENBURG & WHITFIELD and SAMSON & WILCOX, attorneys for appellants.

COLLINS & FLETCHER, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The general facts of this case are like those in *Arnold v. Hart*, 75 Ill. App. 165, and same case, 176 Ill. 442, where they may be seen. In this case, as in that one, the suit is by a depositor in the savings department of the banking business conducted by the appellants and Howe and Bodenschatz, as partners, originally, and by Howe and Bodenschatz as successors to the original partnership.

The pivotal question is whether appellee had notice of the dissolution of the original partnership, and the withdrawal by appellants from the firm, prior to or at the time of making a part of the deposits sued for.

The partnership was dissolved, and appellants withdrew from the partnership November 4, 1895. Most of the deposits were made before the retirement of the appellants from the firm. Two deposits were made afterward—one of one hundred dollars on June 26, 1896, and the other of seven hundred dollars on July 8, 1896.

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Subsequent to the dissolution of the partnership and the retirement of appellants, four withdrawals of money were made by the appellee, two of which were made before said deposit of June 26, 1896, and the other two were made after the said deposit of July 8, 1896.

Upon the occasion of making each one of said four withdrawals, the appellee signed a partly printed and partly written receipt, in form like the one of July 9, 1896, which is as follows:

"Book No. 89.

HAYMARKET PRODUCE BANK,  
HOWE & BODENSCHATZ.

Savings Department.

CHICAGO, July 9, 1896.

Received of.....Howe & Bodenschatz.....the  
sum of fifty...../100 dollars.

\$50. ....

EDWARD BURGDOFF."

The other three receipts varied from the above in date and amount only.

The part of such receipts, except the signature, that was in writing, was written by either Mr. Bodenschatz or Mr. Howe, and then handed over the counter to appellee, who, stepping aside to a convenient desk, there signed his name, and returning, received the money. There was nothing to prevent him from reading the receipts, and he had full opportunity to do so.

The receipts signed by appellee whenever he withdrew money before the appellants withdrew from the business were in substance the same as the one above shown, except that the name "Arnold Brothers, Baker & Company," appeared where "Howe & Bodenschatz" is shown.

Appellee's bank book was not changed in any respect after appellants retired from the business, except by the noting of deposits when, from time to time, they were made.

The change made in the signs on the front of the banking office is described in the Hart case, *supra*, and need not be stated here.

Appellee lived and his place of business was five blocks away from the bank.

There was evidence tending to show that the change in the proprietorship of the bank was generally known in its neighborhood, and there was evidence tending to show that appellee received one of several hundred calendars that were distributed in the bank to its customers, upon which an advertisement appeared, the reading of which would indicate to the reader that the business of the bank was conducted by Howe & Bodenschatz.

Appellee denied that he received one of the calendars, and denied all knowledge, before the bank failed, of the retirement of appellants from the business. He did not specifically deny that he read the receipts signed by him. The question was not specifically asked him.

The amount of the judgment recovered by appellee included the deposits made after the dissolution of the firm and the withdrawal of the appellants from the business, as well as such as were made before, less payments.

We have stated enough, as we think, to make it appear that the question of fact as to whether the appellee had notice of the change in the proprietorship of the bank at or before making the two last deposits, should have been submitted to the jury under accurate instructions as to the law.

At the request of appellee the court gave to the jury an instruction as follows :

“The jury are instructed that no means of knowing or learning of the dissolution of the firm of Arnold Bros., Baker & Co., was sufficient to be regarded as actual notice to the plaintiff as a dealer with the firm before such dissolution unless the plaintiff knew that he had in his possession the means of ascertaining or knowing, and neglected to make use of it.”

An instruction like this was condemned in *Arnold v. Cannon*, 76 Ill. App. 323. The issues in this case were in substance like those involved in the *Cannon* case, and we adopt the reasons given in the latter case as applicable here. We add to what is there said that the instruction is difficult to understand and likely to mislead a jury. Perhaps there may also be other criticisms to which the instruction is subject.

But counsel for appellee argue that the error, if error there is in the instruction, is cured by the answers given by the jury to special questions put to them. Two special questions were submitted to the jury, as follows:

“Had the plaintiff such means of knowledge in his possession that by the exercise of reasonable diligence he would have known of the change in the proprietorship of the Haymarket Produce Bank at the time of the making of his first deposit after such change?”

Had the plaintiff such means of knowledge in his possession that by the exercise of reasonable diligence he would have known of the change of the proprietorship of the Haymarket Produce Bank at the time of the making of his second deposit after such change?”

And to each question the jury answered no.

We understand these questions, and probably the jury did also, as directed to means of knowledge in the possession of appellee at the time of making the deposits, whereas the instruction refers to any time.

The hypothesis of the instruction being different from that of the questions, we can not say that the jury by their answers have denied that of the instruction.

The opinion of the Supreme Court in the Hart case, *supra*, seems to have disposed of most of the important questions of law involved, and will furnish all the guide needed for another trial of the cause. The minor questions upon this record will probably not be encountered upon the next trial, and we will not take time to discuss them.

There not appearing in this record any valid objection to an affirmance of the judgment except as to the amount of the two deposits made by appellee after the dissolution of the original partnership, we will entertain a motion by appellee to be permitted to enter a remittitur accordingly from the judgment, conditioned upon an affirmance of the judgment for the balance, if he shall be so advised.

Unless such motion shall be made within ten days, the judgment will be reversed and the cause remanded because of the error in the instruction referred to. Reversed and remanded unless remittitur is entered.

**Condell Storage & Transfer Co. v. A. H. Baldwin.**

1. **QUESTION OF FACT—Priority of Liens.**—The question as to which of two chattel mortgages is a prior lien upon the property in this case is a question of fact for the jury under proper instructions.

**Replevin.**—Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed November 21, 1899.

**Statement.**—This is an action in replevin brought by appellant against appellee to recover a piano and piano stool and cover. The suit was commenced before a justice of the peace, tried there before a jury and a verdict rendered in favor of defendant (appellee). Appellant took the case to the Circuit Court by appeal where it was again tried before a jury with like result as when tried in the justice's court. Judgment was entered in the Circuit Court upon the verdict, and the cause was brought to this court by appeal.

It appears that appellant sold the piano in question to one Irene Raybett, otherwise known as Irene Clayton. Said Irene paid a part of the purchase price and gave to appellant a chattel mortgage upon the piano for the balance.

Afterward Irene gave a chattel mortgage upon the piano to appellee to secure the payment of money loaned to her by him. She was in possession of the piano from the time of its purchase from appellant up to the time it was mortgaged to appellee. No question is made as to there being any defect in either one of the mortgages.

W. B. BRADFORD, attorney for appellant; JAMES H. WARD, of counsel.

FREDERICK S. BAKER, attorney for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

In the original record filed in this court many changes

and alterations are apparent. When such changes and alterations were made and by whom, it is not necessary to determine in order to decide the case. We leave the question of when and by whom they were made to another tribunal.

This is a contest between two mortgagees, each claiming a lien prior to that of the other. On the part of appellee it is contended that when application was made to him for a loan of money upon the security of said piano, and before he made or agreed to make the loan, he applied to one B. A. L. Thomson to ascertain whether there was any lien upon said piano; that said Irene had referred to said Thomson as to the question of said piano being free from liens; that said Thomson, at the time he was thus applied to, was informed that said Irene had referred to him; that said Thomson stated that there was no lien upon the piano; that there was no demand for the possession of said piano before this suit was commenced; and that thereupon, and relying upon said statement by said Thomson, appellee made the loan and took a mortgage upon said piano as security.

On behalf of appellant it is contended that no such application was made to said Thomson; that said Thomson did not state that there was no lien upon said piano; that demand was made in apt time, and that the right of appellant should not be affected by any statement made by said Thomson.

These are questions of fact for the jury under proper instructions. It appears from an additional abstract of record filed by appellee that said Thomson testified that he was secretary of appellant company, and "the active manager of the organization from its infancy up to the present time;" that one Wehrheim, a brother-in-law of Thomson, was president—that Thomson's wife was vice-president—that Wehrheim's wife was treasurer—and that these four held all the stock of appellant company.

There is no error in the giving or refusing instructions, and we are entirely satisfied with the verdict of the jury.

In regard to the changes and alterations in the original



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record above referred to, it seems to be due to the attorney's appearing in this case in this court to say that it appears from said additional abstract that after said original record had been filed in this court, and upon a hearing in the Circuit Court, and on the 12th day of December, 1898, said Circuit Court entered an order in said cause in which it is recited in substance that the bill of exceptions in said original record was not, and is not, a true and correct transcript of the evidence in said cause or of the stenographic notes thereof, "but had been changed and altered by and at the direction of one B. A. L. Thomson," and that "a fraud and imposition was practiced on this (the Circuit) court by said B. A. L. Thomson."

The judgment of the Circuit Court is affirmed.

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**Chicago & E. I. R. R. Co v. Michael J. Moran.**

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1. **ESTOPPEL**—*By Receiving the Benefit of an Unauthorized Agreement.*—Where a party has received the benefit of an unauthorized agreement and such agreement has been executed, and an equitable estoppel arises in favor of the party executing the agreement, the party receiving the benefit can not be allowed to repudiate an act by which the other has been led into a line of conduct prejudicial to his interests.

2. **WAIVER**—*Of a Consent in Writing.*—Where a construction contract provides that no change shall be made in the materials to be used without the written consent of the engineer, such written consent may be waived by the conduct of the parties.

3. **BUILDING CONTRACTS**—*Application to Extra Materials Furnished.*—Where a construction contract provided that the decision of an engineer upon disputes relative to the agreement should be final and conclusive on the parties, *it was held*, where extra work and materials of a different character from those specified in the contract were used, by a subsequent oral agreement, the provisions of the written contract did not apply.

**Petition for a Mechanic's Lien.**—Appeal from the Circuit Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed November 21, 1899.

This is a petition for a mechanic's lien under the railroad lien statute, against appellant and one Chapman, as original contractor.

In April, 1892, appellant entered into a contract with Chapman for the construction of about forty-six miles of track between Danville and Momence, Illinois. Four days thereafter Chapman entered into a contract with Moran, the appellee, sub-letting to the latter a portion of the work. The sub-contract was identical with the main contract in reference to the masonry, and after providing that the rate should be for "first-class bridge masonry, eight dollars and fifty cents per cubic yard," contains the following :

"It is understood by the parties hereto that the foregoing prices of masonry are based upon the following agreement of the parties as to cost of and freight rates on stone to be used therein, to wit: That the necessary stone for said masonry can be secured from quarries at Williamsport and Independence, Indiana, at three dollars (\$3) per cubic yard, and that the freight rate on such stone, from the quarries to the work will be fifty cents per ton; if the party of the first part is obliged to secure stone from quarries other than those mentioned above, and from such other quarries the rough stone costs more than three dollars (\$3) per cubic yard, the party of the second part will pay the difference between three dollars (\$3) per cubic yard and the cost of such stone, but no stone shall be secured from such other quarries without the written consent of the engineer of the second party. If the freight rate on stone secured from other quarries than those mentioned above is more than fifty cents per ton, the second party will pay, in addition to the prices above named, the excess of such freight rate above fifty cents per ton. If, on the other hand, other quarries are found from which the first party can secure satisfactory stone on which the freight rate from the quarries to the work is less than fifty cents per ton, the second party shall deduct such difference in freight rates on stone, from the prices above named."

It appears from the evidence that sandstone was the only kind of stone obtainable at these Indiana quarries, but as appellant's counsel states, it was found that stone from these quarries was unsatisfactory and other stone had to be used. Thereupon Moran, Chapman and one Baldwin, the chief engineer of the appellant company, got together in Bald-

win's office to discuss this stone question. Moran was finally directed by Chapman and Baldwin to procure stone from a Joliet quarry, and it was agreed that Moran should receive one dollar extra per yard for cutting the Joliet limestone over what he was to have received for the Indiana sandstone, and sixty-five cents a yard to cover the difference in the price of the Joliet over the Indiana stone.

In the latter part of November, 1892, there still remained a comparatively small amount of work to complete appellee's contract. This was the erection of the parapet walls of two bridges, which had been delayed, because when appellee was ready, the railroad company was not ready, and afterward for some reason it was not convenient for appellee to proceed at the time when the company was ready to permit the work to go on. Because of this mutual inconvenience an arrangement was made between Moran and the appellant company, with the consent of Chapman, whereby appellant agreed to complete the wall itself, using the stone which had been cut and provided for the purpose by appellee. For thus setting the stone in and erecting the parapet walls, appellee was to be charged by appellant three dollars a cubic yard.

Appellee testifies that he wanted the company to take the completion of this wall altogether off his hands, and enable him to get rid of the work, and that this Baldwin, the chief engineer of appellant, refused to do. He says that as the arrangement was made he was still to be accountable for the stone in that parapet wall and responsible for any that was missing or a misfit, until the completion of the work. The railroad company was to do only the mechanical work, and Moran was still to furnish the material, just as he would have done if he had with his own men laid the stone in the wall. He had already prepared the stone, and it was there upon the ground. He did no work himself and furnished no new material after December 1, 1892.

The railroad company completed the erection of the wall under its contract with appellee about the middle of December, and on the 17th settled in full with Chapman. The

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latter stated his indebtedness under his contract with appellee to be \$7,582.06. Without verifying this statement by inquiry of Moran, appellant settled with Chapman on that basis, retaining the amount which Chapman thus conceded to be due appellee, to be delivered to the latter upon the condition imposed by Chapman, that Moran should sign a receipt in full and a release discharging both Chapman and appellant from all further liability to Moran growing out of said contract.

Moran refused to sign such a release, and on December 27th, served a notice of lien upon the president of the railroad company.

Upon the hearing of the petition the Circuit Court decreed that appellee was entitled to the lien, and to the extra price as agreed upon for cutting the Joliet stone. The contractor, Chapman, abandoned the case apparently, pending the hearing in the trial court, and the railroad company brings the case here on appeal.

WILL H. LYFORD and ALBERT M. CROSS, attorneys for appellant.

FRANK O. LOWDEN, HENRY D. ESTABROOK and HERBERT J. DAVIS, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

It is first contended by appellant that the notice and copy of contract, required to be served in accordance with the railroad lien act (Rev. Stat. Chap. 82, Sec. 9), were not served upon appellant within twenty days after the completion by appellee of the work under his sub-contract with Chapman. It is contended that the arrangement made with Chapman's consent, between appellee and appellant, about November 23, 1892, in accordance with which appellant completed the parapet walls for Moran, operated as a termination and completion at that date of the sub-contract between appellee and Chapman.

The railroad company finished the work about the mid-

dle of December. The notice required to maintain appellee's lien was served upon appellant December 27th, and within the time required by statute, if it be considered that appellee's sub-contract with Chapman was not completed, until the appellant company finished, under its agreement with appellee, the construction of the parapet walls, which were included within said sub-contract.

If, on the other hand, the arrangement between appellant and appellee, made about November 23d previous, operated as a completion of appellee's sub-contract, because appellant agreed to finish the work itself with the material already furnished by appellee, then the notice served December 27th following, was not served within twenty days of the completion of the sub-contract.

There is no controversy "as to the dates, facts and circumstances of this transaction," as appellant's counsel concede. It is manifest that while Moran did not do any actual work under the sub-contract with Chapman after the arrangement of November 23d, or thereabouts, was made with the appellant company, still the work itself, as required by said sub-contract, was not done until finished by appellant about December 14th. Appellee's contract with Chapman was not completed until that date. It is evident also that his responsibility for a portion of the work, at least, did not cease until that date. According to evidence introduced in behalf of appellant, appellee was allowed for the material and the cutting of the stone composing the wall. All that the appellant company undertook was to lay the stone furnished by Moran in place, that is, erect the wall; and in making the arrangement as to price, Moran allowed, and the appellant company was to receive—deducting it from what, under the sub-contract, Moran was otherwise entitled to—three dollars a cubic yard for setting the stone. No arrangement was made that appellant should supply or cut or recut any stone in case of any deficiency or defect or misfit. It does not appear even that any investigation was made by appellant of the quantity or quality or condition of the stone. The company merely agreed

to set it in place, and all the other work and material agreed to be furnished by Moran under his sub-contract with Chapman he was still liable for until the whole was completed. He was not released from his contract by the arrangement with appellant and his liability thereunder did not end until the stone he agreed to and did furnish was actually in place and the parapet walls completed. This was not until about December 14th, and his notice of lien was served December 27th, within twenty days of the completion of the sub-contract.

There are other considerations which lead to the same conclusion. The railroad company clearly, under the arrangement with Moran, would not have been obliged to settle with Chapman, the original contractor, and pay him for the work Moran was to do until it was actually done, and it was thus ascertained that the stone Moran was furnishing was sufficient in quantity and in all other respects to comply with the contract. Appellant did not, in fact, settle with Chapman until December 19th, four days after the completion of the parapet walls, as required by the contracts.

When it did thus settle, Chapman admitted indebtedness to Moran, and appellant accepted his statement of the amount of that indebtedness without verifying its correctness, when, according to its own answer, it might have been put upon its guard by the condition which Chapman exacted to be complied with before Moran should be paid what Chapman admitted was due him, viz., that he should sign a receipt in full and a release of both Chapman and appellant from further liability.

It is urged that the Circuit Court erred in overruling certain exceptions to the master's report. These refer to an extra allowance to Moran for cutting 3,548.8 yards of Joliet stone at \$1 per yard, and to the allowance of interest. The real contention is as to the allowance of anything extra for cutting the Joliet stone.

It is conceded that a verbal agreement was made between Moran, Chapman and one Baldwin, representing appellant

as its chief engineer, that Moran should receive this \$1 per cubic yard for the 3,548.8 cubic yards of stone for which the allowance complained of was made. Appellant's contention is that this verbal agreement is in contravention of the written contract between Moran and Chapman, and therefore void. It is not denied that Moran proceeded under the agreement, in good faith, to furnish, and did furnish and cut, this quantity of Joliet limestone.

We perceive no reason why the railroad company could not agree—if it desired that Joliet limestone should be used instead of the Indiana sandstone called for by the contract—to pay Chapman, for Moran, the excess, or supposed excess, in cost of the former stone over the latter; nor why appellant could not make an explicit and binding agreement to pay the extra dollar per cubic yard in consideration of getting the Joliet stone.

It is urged, however, that the contract in writing between Chapman and appellee contemplated this very contingency, that it might become necessary to use other stone than that described therein, and provided just what extra compensation should be paid in such case, whether for Joliet or any other stone, and that no more can be recovered, notwithstanding the new verbal agreement.

The sub-contract contains a provision that if Moran "is obliged to secure stone from quarries other than those mentioned above, and from such other quarries the rough stone costs more than \$3 per cubic yard, the party of the second part (Chapman) will pay the difference between \$3 per cubic yard and the cost of such stone. But no stone shall be secured from such other quarries without the written consent of the engineer of the second party."

The contract expressly distinguishes between the "cost of and freight rates on stone." While the charge for freight in case stone was procured from other quarries was specified in the contract, the difference in cost of such stone was not thereby expressly fixed. It was left to be ascertained when the contingency should arise.

It would appear that the use of Joliet limestone, involv-

ing extra expense in cutting over Indiana sandstone, was a contingency not contemplated when the contracts were drawn. This is indicated by the conduct of the parties. When the question arose, appellant's chief engineer did not claim that the appellee could be compelled to use Joliet stone under the contract. Such an idea seems not to have been suggested. We think it clear the parties themselves so construed the contract, and regarded the extra expense of cutting the Joliet limestone over the Indiana stone as not covered by the contract, and to be provided for by a new agreement. Else why was such new agreement made? It was made, and appellee in good faith furnished and cut the more expensive stone thereunder. Appellant received the benefit. The agreement having been executed, an equitable estoppel certainly arises in Moran's favor, and appellant can not now be allowed to repudiate its own act by which appellee was led into a line of conduct prejudicial to himself. *Worrell v. Forsyth*, 141 Ill. 22-30, and cases there cited.

Nor do we regard this conclusion as in any way affected by the provision of the contract relied upon by appellant, as follows: "The following are the full rates upon which this agreement is based, viz.: First-class bridge masonry, eight dollars and fifty cents per cubic yard." This provision of paragraph 7 of the contract is immediately followed by the portion of the contract wherein Chapman agreed to pay the difference in cost in case Moran was obliged to procure rough stone from "other quarries," costing more than the Indiana stone. This difference was to be over and above the "full rates," as stated in said paragraph 7, and it appears to have been so treated by the parties. The witness Dawley stated that sixty-five cents extra per cubic yard was allowed Chapman therefor by appellant. This difference was due Moran from Chapman under the sub-contract, and its correctness is not disputed. But it is over and above the original "full rates" of eight dollars and fifty cents per yard provided by the contract for first-class bridge masonry, and shows the construction



of that clause by the parties themselves, viz., that under certain conditions that price for the masonry was not to be the full rate.

We do not regard the authorities cited by appellant's counsel to show that "a written, sealed executory contract can not be modified by a parol agreement" as in point, under the facts.

The objection is made that there was no consent in writing by Baldwin, appellant's engineer, for use of the Joliet stone. It is conceded he did consent, and he not only consented for the railroad company but desired and directed it to be substituted for the Indiana stone. It was so substituted, and was accepted and used by the appellant. The objection is purely technical. The written consent must be deemed to have been waived by appellant's conduct. *City of Elgin v. Joslyn*, 36 Ill. App. 301.

It is again objected to the allowance for this Joliet stone, that it is in the contract provided that the decision of appellant's engineer on any dispute relative to the agreement shall be final and conclusive on the rights and claims of the parties.

But there was no dispute. By the construction of the contract made, as we have seen, by the parties themselves, the extra cost of cutting the Joliet stone was treated as outside of, and not controlled by, the written contract. It is only disputes relative to the written contract that the engineer's decision is to control. Where extra work and materials are of a different character from those specified in the contract, the provisions of the latter will not apply. *City of Elgin v. Joslyn*, 136 Ill. 525-531, affirming 36 Ill. App. above referred to.

If, however, it be conceded, for the sake of the argument, that it was within the province of appellant's chief engineer to determine whether the extra allowance for cutting Joliet stone was covered by the written contract, he did so determine that it was not when he made a new agreement with Chapman and appellee that the latter should receive the extra dollar per cubic yard. More

over, he allowed the extra dollar on about nine hundred cubic yards. Under the clause in question his decision was made "final and conclusive" on the rights and claims of the parties. It would be equally conclusive upon both parties. He had no authority to make one decision to-day and change it to-morrow, after both parties had accepted and acted upon it in good faith. Moran had, in the meantime, procured and was using Joliet stone, and that clause could give Baldwin no power arbitrarily to set aside a "final and conclusive" award, in order to make another and different award upon the same point.

It is contended that the trial court erred in directing by its final decree that appellee be entitled to an order of payment of five thousand dollars held by appellant for Moran's use, with interest, or so much of said sum, with interest, as shall remain when any judgments or orders in certain garnishment proceedings then pending against appellant should be satisfied or the liability thereunder terminated. It appears that two attachment suits had been commenced against appellee and appellant had been garnisheed.

The five thousand dollars referred to is a balance of the money appellant had received from Chapman for payment to Moran. By an agreement between appellant and appellee, made while this suit was pending, appellant was to "hold said five thousand dollars for the sole use and benefit of said Moran, after the payment of any sum or sums it may be found liable for as garnishee in said attachment proceedings."

The petition prays for such general relief as the case may require. We see no reason why the court, having jurisdiction of the subject-matter and the parties, could not, under the pleadings and the evidence before it, settle the rights of the parties as to all matters relating to the litigation. Appellee ought not to be compelled to bring another suit to recover this five thousand dollars which the evidence shows is his money, due him on the sub-contract, and which appellant concedes it holds for his sole use and benefit, subject to the determination of the attachment and garnishment proceedings.

As to that portion of the decree requiring payment of interest on said sum by appellant, we think it erroneous to provide for such payment now, it appearing that the money is rightfully withheld by appellant for its own protection. If, upon application for an order upon appellant under the decree, upon proper evidence of the discharge of appellant as garnishee, any reasons should appear for allowing interest, another question may arise. Appellant could not be allowed to retain for its own benefit appellee's money without compensating him for its use or detention, but it does not at present appear that it has done so. Until it does so appear it is premature, at least, to provide in the decree for the allowance of interest upon the money in question. We do not regard it as necessary to remand the cause because of the error in that respect, which only affects a possible future order in the case.

If it becomes necessary for appellee to apply to the chancellor for an order requiring payment of this five thousand dollars, it will be time enough then for the court to determine whether or not appellant has become liable for interest.

For the reasons indicated the decree of the Circuit Court will be affirmed.

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### Francis M. Bacon et al. v. Christian Schepflin et al.

1. **RECOVERY**—*The Cause of Action Must Exist at the Commencement of the Suit.*—The cause of action must exist at the time of the institution of the suit, and where the demand had not then matured, the defendant may avail himself of the objection at the trial under a plea of the general issue.

2. **EVIDENCE**—*Under the General Issue—No Cause of Action at the Commencement of the Suit.*—Evidence is competent under a plea of the general issue showing that, at the commencement of the suit, the money sued for was not due.

3. **PRACTICE**—*What May Be Shown Under the General Issue.*—It is always proper to show, under the plea of non-assumpsit, that the plaintiff had no cause of action at the commencement of the suit.

4. **VERDICTS**—*Where Responsive to the Issues.*—If, by looking into the record, the verdict can be seen to be responsive to the issues submitted, it will be sustained.

**Attachment and Garnishment.**—Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed November 21, 1899.

MOSES, ROSENTHAL & KENNEDY, attorneys for appellants.

ARTHUR W. UNDERWOOD, attorney for appellees.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

March 21, 1895, a suit in attachment was commenced by appellants against appellees, and garnishees were served. Appellees filed in said cause what was called a plea in abatement. To this plea a demurrer was interposed by appellant. That demurrer was overruled by the trial court, and such ruling by the trial court was reversed by the Appellate Court of this district (63 Ill. App. 17). In accordance with the opinion of the court, appellees answered over by filing their plea of general issue.

At the trial upon the issue thus presented, the only evidence offered by appellants as to the indebtedness of appellees to appellants is an assignment for the benefit of creditors, made by appellees. It is stated in this record that in the list of creditors attached to said assignment (which is not in this record) are the following words, viz.:

“Bacon & Co. \$3,386.20, open account.”

No caption or heading to any list of creditors is shown, nor is there any testimony as to when the amount owing to appellants became or was to become due and payable.

Appellees introduced evidence to the effect that such indebtedness did not mature or become due and payable until about May 3d, *i. e.*, some six weeks after this suit was commenced. To the introduction of that testimony by appellees, the appellants duly objected and excepted.

There was no other evidence offered in the case. Thereupon appellants moved the court to instruct the jury as follows, to wit:

“The court instructs the jury, as a matter of law, that

the alleged defense of the non-maturity of the plaintiffs' account at the time of the beginning of this suit can not be raised under the plea of general issue.

"The court instructs the jury, as a matter of law, that under the pleadings in this case the alleged defense of non-maturity of the plaintiffs' account, at the time of the beginning of this suit, can not prevail, and the same should be disregarded by the jury.

"The court instructs the jury to find the issues for the plaintiffs herein, and to assess the plaintiffs' damages at the sum of \$3,386.20."

The court refused each of said instructions, and appellants duly excepted.

Thereupon, at the request of appellees, the court gave the following instruction, viz.:

"The court instructs the jury to find the issues submitted to them in this case for the defendants."

On behalf of appellants it is urged, (1) that non-maturity of a debt must be pleaded in abatement and not in bar; and (2) that appellees, having pleaded non-maturity by plea in abatement, could not prove that fact under the general issue.

First. Although the fact that a debt had not matured under the contract sued on at the time suit was commenced may be pleaded in abatement, it may also be shown under the general issue. Mr. Justice Bailey, speaking for the court, states the rule very clearly in *Kahn v. Cook*, 22 Ill. App. 559, 562, thus:

"The cause of action must exist at the time of the institution of the suit, and where the demand had not then matured and the general issue is pleaded, the defendant may avail himself of the objection at the trial. *Collins v. Montemy*, 3 Ill. App. 182. It is always proper to show, under the plea of *non-assumpsit*, that the plaintiff never had a cause of action."

In *Hamlin v. Race*, 78 Ill. 422, in which the general issue only was pleaded, the court said:

"We had supposed no rule was more inflexible or better established than that a plaintiff can not recover for money not due at the institution of the suit."

It is urged that the rule, as stated in *Kahn v. Cook*,

*supra*, is, in effect, held to be incorrect in Pitts' Sons v. Com. Nat. Bk., 121 Ill. 582, decided soon after. But prior to the Kahn case, the Supreme Court, in Culver v. Johnson, 90 Ill. 91, had laid down the same rule that is given in Pitts' Sons case. The rule, as stated in the Culvert case, was no doubt before Mr. Justice Bailey when he wrote in the Kahn case.

But we do not understand that the rule laid down in the Kahn case is in conflict with the cases in the Supreme Court. The defense in each of said Supreme Court cases was that by a subsequent and separate agreement the time of payment, fixed by the regular contract sued upon, had been extended, and in each case it was held that such extension agreement could not be proven under the general issue. The rule, as stated in the Kahn case, is recognized in the Culvert case, where the Supreme Court says :

"It may be, if the defense had been that at the time of the institution of the suit the money was not due by the terms of the contract sued on, a different rule would apply."

The case of Am. Merchants' Mfg. Co. v. Kantrorvitz, 77 Ill. App. 155, is cited by appellant as being in conflict with the Kahn case. In that case the question is not definitely decided, but the intimation there made is not the law.

Second. Were the appellees estopped from proving that the debt had not matured under the terms of the contract sued on, because they had filed said so-called plea in abatement?

Appellees attempted to file, in the case at bar, a plea in abatement, and to thus present the issue that the debt had not matured. But it was held (63 Ill. App. 17, cited *ante*,) upon demurrer that the plea was bad as a plea in abatement, and that appellees should answer over. Even if the rule be as contended (as to which we express no opinion), that by pleading in abatement the non-maturity of the debt a defendant waives the right to tender the same issue by plea in bar, still it would not be applicable here, because the appellees did not plead in abatement, although they

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attempted so to do. It can not now be held that they plead in abatement when it has been adjudicated in this case, at the instance of these appellants, that the plea referred to is not a plea in abatement.

It is also contended that the judgment must be reversed, for the reason that the recorded verdict is against the "defendant" when there is more than one defendant.

The court instructed the jury to find the issues for the defendants, using the word in the plural. With that fact in the record the omission of the letter "s" in the recorded verdict, thus using the word in the singular number, does not vitiate the judgment.

In *Daft v. Drew*, 40 Ill. App. 266, the verdict was for the "plaintiff," the fact being that there were several plaintiffs. The letter "s" was omitted from the recorded verdict, the same as in the case at bar. The court there states that "as to irregular and informal verdicts, the rule is that if by looking into the record the verdict can be seen to be responsive, it will be sustained."

The judgment of the Superior Court is affirmed.

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### August Miller et al. v. H. G. Goelitz.

1. **PRESUMPTIONS**—*Trials Without a Jury*.—Where a case is submitted to the court for trial without a jury, the presumption is that the judge, in trying the case, has determined correctly, and unless the findings are clearly against the preponderance of the evidence, they will not ordinarily be disturbed.

2. **ESTOPPEL**—*By Acquiescence*.—Where a note was given in settlement of a running account, which contained, among others, some items for plumbing, through a series of years prior to the time suit was brought, a defect in the plumbing, which had been in use for more than four years, was held to be no defense to the note.

**Assumpsit**, on a promissory note. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed November 21, 1899.

AMERICUS B. MELVILLE and WILLIAM G. HATCH, attorneys for appellants.

CARLOS J. WARD, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This was a suit upon a note, executed by appellants, upon which judgment was entered by confession in favor of appellee, which was subsequently set aside and appellant allowed to plead.

The judgment note was given in settlement of a balance due appellee for plumbing. The work was done in August, 1893. The note was given January 16, 1896, payable one year after its date. It appears that appellants employed appellee to do other plumbing and gas-fitting, during the following year at least; that payments were made on account, and the note in controversy was given in settlement of a balance due, and included \$10 interest, which appellant Miller agreed to pay. This settlement was made nearly two years and a half after the work which is now objected to had been completed. It was not until after judgment by confession had been entered upon the note, in January, 1898, that appellants discovered the job now complained of, completed nearly four years and a half before, was defectively and improperly done.

Appellants contend that the evidence shows the work was done contrary to the contract, and contrary to the ordinances of the town of Cicero.

The contract was verbal, and the testimony as to what was said at the time is somewhat conflicting. The case was submitted to the court without a jury. The presumption is that the judge trying the cause has determined correctly. (Casey v. Vandeventer, 76 Ill. App. 628.) Unless the findings are clearly against the preponderance of evidence they will not ordinarily be disturbed. (Burgett v. Osborne, 172 Ill. 227-238.) We can not say from this record that the work was not done in accordance with the agreement between the parties.



After judgment by confession had been entered against appellants, the latter procured the superintendent of the town of Cicero to examine the plumbing, and the latter testifies that in some respects the plumbing in question does not comply with the present town ordinances. It appears from the testimony of this witness that he is not, and never has been, a plumber, and his qualifications as an expert witness are, by his own statements, very doubtful. His testimony in this respect is not abstracted; whether intentionally or only carelessly omitted we can not determine. But an omission of this kind casts grave doubt upon the abstract as a whole, and strengthens the presumption that the trial judge, who saw and heard the witnesses, could better ascertain and determine the truth than can the Appellate Court from reading the testimony, especially in a defective abstract. By this abstract the witness is made to say that the present ordinances forbid horizontal soil pipes, and that such ordinance was passed in 1897, and does not differ from the old one. Our attention is called to the fact that the record shows the witness did not so testify; that it was not the witness, but appellants' counsel, who stated that the ordinance of 1897 did not differ from the old one.

This may have been true, but it is not evidence, and should not appear as such in the abstract. We have inspected the testimony of this witness in the record itself, and are of opinion that the evidence fails to show a violation of the ordinance in force when the work was done.

But in any event, the objections here urged to the judgment come too late. The note was given in settlement of a running account between the parties, which included other items, as well as the particular item of plumbing which it is claimed was contrary to the ordinances. Interest was paid upon this note from time to time after it was made. It is no defense at this late date against a settlement made by the parties themselves, and acquiesced in for years, that there is now some defect in the plumbing, which had been in use when complaint was first made more than four years.

The judgment of the Circuit Court is affirmed.

**Annie Ball v. Annie Serum et al.**

1. **DECREES**—*Must Correspond to the Allegations of the Bill.*—A decree which is contrary, both to the allegations of the bill and the evidence, can not be sustained.

2. **SALES**—*Necessary Elements.*—To constitute a valid sale there must be a concurrence of the parties competent to contract; mutual assent; a thing, the absolute or personal property in which is transferred from the seller to the buyer, and a price in money paid or promised.

**Foreclosure of a Trust Deed.**—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded, with directions. Opinion filed November 16, 1899.

F. L. SALISBURY, attorney for appellant.

SHERMAN & BURTT, attorneys for appellees.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a decree rendered in a suit for the foreclosure of a trust deed, in which appellant was complainant and Andrew Peterson, trustee, George P. Bay, successor in trust, Annie Serum, Helena Serum, Martin H. Serum and others, defendants.

The trust deed was executed by Andrew H. Serum and Annie Serum, his wife, December 5, 1891, of certain premises therein described, to secure the payment of a promissory note of the same date, for the sum of \$5,000, with interest at six and one-half per cent per annum, payable semi-annually at the banking house of Peterson & Bay, in Chicago, made by Andrew H. Serum, payable to his order and by him indorsed. The semi-annual installments of interest were evidenced by ten interest notes for \$162.50 each, with interest at seven per cent per annum after maturity, payable at said banking house, made by Andrew H. Serum, payable to his order and indorsed by him. The default alleged in the bill is the non-payment of the interest note which fell due June 5, 1896, and the non-payment of taxes

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and insurance. By amendment to the bill, the Western State Bank and others were made defendants. Andrew Peterson, trustee, George P. Bay, successor in trust, the Western State Bank and Peterson & Bay, personally, answered the bill, averring that the principal note above mentioned was made by Andrew H. Serum, in consideration of a loan to him by Andrew Peterson and George P. Bay, who were partners as Peterson & Bay, and that the trust deed above mentioned was made to secure the same and the interest notes; that the principal note and interest notes were sold by Peterson & Bay to the complainant, and that the first six interest notes were paid to her; that, June 6, 1895, complainant sold to Peterson & Bay interest note number 7, and, July 1, 1895, Peterson & Bay sold all their interest in the banking business, including interest note number 7, to the Western State Bank, and that said interest note is now the property of said bank; that, December 14, 1895, complainant sold to the Western State Bank interest note number 8, which is now the property of said bank; that Andrew Peterson, trustee, to protect the interest of Andrew Peterson, August 19, 1895, paid \$101.14 taxes; that October 8, 1895, said premises were sold for taxes, and October 21, 1895, Andrew Peterson purchased the certificate of sale by paying therefor \$79.96, and August 19, 1896, said Peterson was compelled to pay the further sum of \$88.14 to protect said security, and that said three payments of taxes were made by said Andrew Peterson, trustee, at the request and solicitation of complainant, etc. The same parties who made the foregoing answer filed a cross-bill containing substantially the same allegations as the answer, and claiming that the lien of Western State Bank and Andrew Peterson are superior to the lien of appellant, and praying that they be decreed to be a first lien, etc. Complainant answered the cross-bill, denying the alleged sale to Peterson & Bay of interest note number 7, and the alleged sale to the Western State Bank of interest note number 8, and averring that about June 6, 1895, interest note number 7 was paid to her at the office of Peterson &

Bay, where it was payable, and where all prior interest notes had been paid, and that, about December 14, 1895, she presented interest note 8 at the office of the Western State Bank, successor to Peterson & Bay, said office being the same formerly occupied by Peterson & Bay, and that the same was there paid. Complainant, in her answer to cross-bill, also denies that any taxes were paid by Andrew Peterson, trustee, at her request or solicitation. It is unnecessary to refer to the pleadings of other parties or the proceedings in respect to them, as the sole contest here is between appellant and the Western State Bank.

Issue was made up on the bill, cross-bill and answers mentioned, and the cause was referred to a master to take proofs and report his conclusions and opinion of law and evidence. The master reported that the amount due to appellant should be decreed to be a first lien, and the amount due the Western State Bank, on account of interest notes 7 and 8 and taxes paid on premises, should be decreed to be a second lien. The court decreed a sale of the premises described in the trust deed, the payment of certain costs from the proceeds, and thereafter as follows :

"First. To the Western State Bank the amount due it under this decree for taxes paid by it, and which is hereinbefore decreed to be a first lien on said premises.

"Second. If the balance then remaining in his hands shall be sufficient, he shall pay to the complainant, Annie Ball, and the Western State Bank, the amounts due them, respectively, under this decree, and hereinbefore decreed to be second lien on said premises. If insufficient, he shall distribute said balance between said complainant, Annie Ball, and the Western State Bank *pro rata*, as far as the same will reach."

The court found, in its decree, that there was due the Western State Bank, for taxes paid by it, \$400.59, and on account of interest notes 7 and 8, \$386.81.

Two questions are presented for decision: First, whether the court erred in decreeing a lien in favor of the Western State Bank for the taxes alleged to have been paid; and, second, whether the court erred in decreeing a first lien in

favor of said bank for the amount due on interest notes 7 and 8. It is alleged, both in the answer and cross-bill of the Western State Bank and others, that Andrew Peterson, trustee, paid the taxes, and the evidence corresponds with the allegation. Lawrence Nelson, a witness on behalf of cross-complainants, testified that he had been cashier of the Western State Bank since July 1, 1895, when the bank succeeded to the banking business of Peterson & Bay, and that before that time he had been cashier for Peterson & Bay for ten years. In respect to the taxes for the years 1894, 1895 and 1896, being all the taxes mentioned in the answer and cross-bill of the Western State Bank and others, this witness, in his examination in chief, testified positively that the taxes were paid by Andrew Peterson, trustee. A certificate of sale for the taxes of 1894, assigned by the purchaser, a certificate of redemption from sale for the taxes of 1895, issued to Andrew Peterson, trustee, and a receipt running to Andrew Peterson, trustee, for the taxes of 1896, were identified by the witness and put in evidence, and he testified that the money paid on the assignment of the certificate of sale, the redemption certificate, and the receipt, was all paid by Andrew Peterson, trustee, and that the assigned certificate of sale and the redemption certificate are the property of Andrew Peterson, trustee. The witness, on his cross-examination, testified that the money paid as above stated by Andrew Peterson, trustee, was the money of the Western State Bank. The matter then stands thus: The Western State Bank, both in its answer and cross-bill, avers that the taxes were paid by Andrew Peterson, trustee. In the cross-bill it is averred "that by the terms of said trust deed, the amount advanced by said Andrew Peterson, trustee, should be allowed to him as a first lien upon the mortgaged premises," etc. The proof shows that the money paid on account of taxes was paid by Andrew Peterson, trustee, and appellee's counsel, in their argument, quote extracts from the trust deed which they claim justified the trustee in paying taxes and redeeming from tax sales, showing that their theory corresponds with the allegations of

the cross-bill and the evidence, namely, that the payments were made by Peterson, as trustee. The decree, in finding that the Western State Bank paid the taxes and decreeing a lien in favor of it for the taxes, is erroneous. It is contrary both to the allegations of the cross-bill and the evidence, and can not be sustained. *Parkhurst v. Race*, 100 Ill. 558; *Gorham v. Farson*, 119 Ib. 425.

If, as Nelson testified, Peterson used the bank's money in paying the taxes, the bank must look to Peterson, or if he is deceased, as has been suggested in this court, to his estate.

The facts in regard to interest notes 7 and 8 are as follows: June 30, 1892, appellant became the owner by purchase from Peterson & Bay of the principal note and all the interest notes hereinbefore described, which notes were payable, as heretofore stated, at the banking house of Peterson & Bay. The first six interest notes were presented at the banking house of Peterson & Bay and were there paid. Mary Parkinson testified that she presented for appellant interest notes 7 and 8, and that Mr. Nelson, the cashier, gave her a check for them. The amount of the check given when interest note 8 was presented was for the amount due on note 8, and also on another interest note presented by Miss Parkinson with interest note 8, and which is not involved in this case. It does not appear that anything was said when interest notes 7 and 8 were paid. Miss Parkinson says there was no conversation when number 8 was paid, and Nelson says he remembers none when either 7 or 8 was paid.

Interest note 9 fell due June 5, 1896, and was presented at the Western State Bank for payment about June 9, 1896, when she was informed there was no money to pay it, and also that interest notes 7 and 8 had not been paid by the maker. Nelson testified that after June 9, 1896, he asked appellant to pay interest notes 7 and 8, and that this was the first time she had been requested to pay them. Appellant had not been notified, prior to the presentation of interest note 9 for payment, that the maker of the notes

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had not paid notes 7 and 8. Andrew Peterson was president of the Western State Bank when that bank succeeded to the business of Peterson & Bay, and thereafter.

Interest note 7 was paid at the banking house of Peterson & Bay before the Western State Bank succeeded to their business. Interest note 8 was paid after the Western State Bank had succeeded to the business of Peterson & Bay. It was paid at the office of the last named bank (which was formerly the office of Peterson & Bay) by the check on said bank of Lawrence Nelson, cashier, and Nelson was authorized to give the check by Andrew Peterson, trustee, who was then the president of the Western State Bank. Miss Parkinson, who presented appellant's interest notes for payment, says that she always did business at the bank with Mr. Nelson, cashier. Nelson testified that when interest notes were presented at the bank they paid them, whether the money had been collected from the maker or not; that if the money had been collected, they canceled the notes, and if the money had not been collected, they did not cancel them, but held them as assets of the bank. The evidence shows, however, that appellant had no knowledge of this mode of doing business, if such was the mode. Interest notes 7 and 8 were put in evidence by the Western State Bank, and are uncanceled.

It is now claimed by counsel for the Western State Bank that interest note 7 was sold to Peterson & Bay, and interest note 8 to the Western State Bank, by appellant.

"To constitute a valid sale, there must be a concurrence of the following elements, viz.: 1st, parties competent to contract; 2d, mutual assent; 3d, a thing, the absolute or general property in which is transferred from the seller to the buyer; and, 4th, a price in money paid or promised." Benjamin on Sales, Sec. 1; *Butler v. Thompson et al.*, 93 U. S. 412, 414-15.

In the last case the court say :

"The essential idea of a sale is that of agreement or meeting of minds, by which a title passes from one and vests in another." Parsons says: "All that is necessary is, that the parties should intend, the one to part with his

property, the other to become the owner of it. The union of intention constitutes the contract of sale."

In the present case it is conceded that there was no express contract of sale, and the evidence is that nothing was said at the times the interest notes were presented and paid; but counsel for the Western State Bank contend that a contract of sale may be inferred from the circumstances. How can the intention of appellant to sell (which intention is an essential element of a contract of sale) be inferred? Certainly not from the previous course of dealing between the parties. The interest notes were payable at the banking house of Peterson & Bay; she had presented six of them after maturity at that banking house, and they were then paid by the delivery to appellant of checks by the cashier. Interest note 7 was paid in like manner while Peterson & Bay were still in business, and interest note 8 was paid by the same cashier, at the same place, by check on the Western State Bank, drawn by authority of Peterson, the trustee, who was then the president of that bank. There was absolutely nothing from which appellant could infer that notes 7 and 8 were not paid as the six prior notes had been, or that the maker of the notes had not deposited with Peterson & Bay the money with which to pay them, and it is a significant circumstance that not until long afterward, when interest note 9 was presented for payment, was it intimated to appellant that notes 7 and 8 had not been paid by the maker, thus delaying appellant in instituting foreclosure proceedings for at least half a year. Peterson & Bay must have known when note 7 was paid, and Peterson when note 8 was paid, that appellant understood that she was receiving payment of the notes, not selling them. The notes were paid in full, after maturity; they were not discounted. It is certainly an unusual, if not unprecedented circumstance, for a bank to purchase overdue paper, paying therefor its full face value. We are of opinion that appellant did not sell notes 7 and 8, or either of them.

Counsel for the bank rely on *Ketchum v. Duncan*, 96 U. S. 659, and *Miller v. R. & W. R. R. Co.*, 40 Vt. 399. In the



former case it appears from the opinion of the court that the facts were essentially different from the facts in the present case. The court say :

“The coupons were not paid in the usual manner, or at the usual place, or by the persons accustomed to pay them. Before May, 1874, the coupon paid at Mobile had always been paid at the office of the company by its officers, and had been left there. They had been paid, it is true, by checks drawn on the bank of Mobile; but the holders had received those checks only on the delivery of the coupon to the company. In regard to the May and November coupons of 1874 this usage was changed. The coupons were not left at the company's office. They were taken there for verification, and then returned to the holders, with directions to take them to the bank, where they would be paid; but no checks drawn upon the bank were given to the holders. Some of them knew the company was not paying those coupons. Others inquired, and were told the bank would purchase. Others did not know the company would not pay, and they made no inquiry,” etc.

The opinion, too, was by a divided court, four of the judges holding that there was no sale of the coupons. After a careful reading of the opinion in the Vermont case, we do not think it applicable to the facts in this case. In the Vermont case, the court say :

“A court of equity will not convert a payment into a purchase in favor of a party advancing the money, when there is a superior countervailing equity in another party.”

The following authorities are opposed to the contention of counsel for the bank : Union Trust Co. v. Monticello & P. J. R. Co., 63 N. Y. 311; Farmers L. & T. Co. v. Iowa Water Co., 78 Fed. Rep. 881; Fidelity Co. v. R. Co., 138 Pa. St. 494; Collins v. Adams' Ex'rs, 53 Vt. 433; Pearce v. Bryant Coal Co., 121 Ill. 590, 597. See also Martin v. Bank, 94 Tenn. 176.

Nelson testified that the taxes were paid at the request of appellant, and appellant, while denying this, expressed a willingness to pay the taxes. We are of opinion, therefore, that the taxes should be declared a first lien in favor of the person paying them, who, so far as appears from the record

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before us, was Andrew Peterson, trustee. Since the appeal was perfected it has been suggested in this court that Andrew Peterson departed this life January 19, 1899, but his personal representative, if any, has not been made a party to this appeal. If it shall appear in future proceedings in the Circuit Court that the money to pay interest notes 7 and 8 was furnished by the Western State Bank, and that the bank has not been repaid, we think it equitable, no one here objecting thereto, that, if there shall be any surplus of the proceeds of the sale of the mortgaged premises, after paying, first, the taxes, and second, the amount due to appellant, that such surplus should be applied to the payment of interest notes 7 and 8. The decree will be reversed and remanded, with directions to proceed in accordance with this opinion. All costs of this appeal are to be paid by the Western State Bank, appellee.

Reversed and remanded, with directions.

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### Robert Kelso v. Daniel F. Crilly.

1. EVIDENCE—*Letters from Attorneys Holding Claims for Collection.*—In an action by a landlord, under a clause in a lease providing that at its termination by lapse of time or otherwise, the tenant shall yield up immediate possession, and failing so to do, shall pay as liquidated damages, the sum of ten dollars per day, for the whole time such possession was withheld, a letter from the landlord's attorney in whose hands the matter had been placed for collection, stating that the claim was for rent due, is competent to be considered as bearing upon the question as to whether the landlord had elected to hold the defendant as his tenant after the expiration of the lease.

2. LANDLORD AND TENANT—*Persons Holding Over—Occupants or Tenants.*—Very slight acts on the part of the landlord, or a short lapse of time, are sufficient to conclude his election and make the person holding over, his tenant.

**Covenant of a Lease under Seal.**—Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed November 16, 1899.

**Statement by the Court.** —Crilly, the appellee, demised certain premises in Chicago to Kelso, the appellant, by lease expiring April 30, 1891, at a monthly rental of \$75 per month. Among other provisions in the lease was the following:

“At the termination of this lease, by lapse of time or otherwise, to yield up immediate possession to said party of the first part, and failing so to do, to pay as liquidated damages, for the whole time such possession is withheld, the sum of ten (\$10) dollars per day; but the provisions of this clause shall not be held as a waiver by said first party of any right of re-entry as hereinafter set forth; nor shall the receipt of said rent or any part thereof, or any other act in apparent affirmance of the tenancy, operate as a waiver of the right to forfeit this lease and the term hereby granted for the period still unexpired, for any breach of any of the covenants herein.”

Appellant took possession of the demised premises, and occupied them until the end of the lease, and until about September 1, 1891, in all 120 days. Appellee brought an action in covenant to recover for the time that appellant held over, 120 days at \$10 per day, under the covenant to yield up possession on the expiration of the lease above quoted.

The pleas were *non est factum* and four additional pleas filed by leave of the court, the first denying the withholding of the demised premises after the expiration of the lease; second, alleging that the failure to deliver up possession was because of plaintiff's consent that defendant should retain possession after the expiration of the lease; third, alleging that defendant occupied premises in question after expiration of the lease because of leave and license of the plaintiff that defendant might continue to occupy the same; and, fourth, alleging that defendant did yield up possession of demised premises according to the form and effect of the lease. A similiter was filed to said plea of *non est factum*, and also to the first and fourth additional pleas, and also replications, taking issue upon the second and third additional pleas.

A trial was had which resulted in a verdict for appellee of \$300, but the court granted a new trial. A second trial

resulted in a verdict for appellee of \$1,600, by direction of the court at the close of all the evidence, on which, after a remittitur of \$750, the court rendered judgment for \$850, from which this appeal is taken.

The evidence offered on behalf of the defense tends to show that appellee employed an attorney, Edwin Burritt Smith, to settle his claim against appellant for rent upon the premises in question for \$712.50. A letter written by Mr. Smith was offered in evidence as follows:

"MAY 16, 1892.

MR. ROBERT KELSO, 697 Austin Avenue, City.

DEAR SIR: Mr. Daniel F. Crilly has placed in my hands for collection his claim against you for \$712.50, being for rent due on premises known as No. 63 Market street, from May 1, 1891, to April 30, 1892. Unless this matter is settled within one week I am directed to bring suit.

Yours very truly,

EDWIN BURRITT SMITH."

This letter, on objection by counsel, was excluded from the jury.

Appellant testified, among other things, that appellee's agent called upon him after May 1, 1891, and demanded rent at the rate of \$100 per month, which appellant refused to pay, and that later said agent again called upon appellant for rent, when appellant said to the agent, "Give me a receipt and I will pay what I owe you;" that the agent then said that he had no authority to do that, but would take it on account; that appellant replied, "I don't keep an account with you. You never had to come a second time. If you will give me a receipt I will pay you what I owe you."

Appellant further testified that neither appellee nor his agent asked appellant to vacate the premises after May 1, 1891, and that the last day of August he, appellant, delivered the keys to appellee's agent, at his office; that the agent took the keys, threw them on the floor, and said he could not receive them.

Appellant further testified that in the latter part of April, appellee offered to give him the place for \$90 a month and a lease for one year, to which appellant replied that he did

not want it at any price, for he had no use for it, but that he would occupy the premises until appellee could rent them. To this appellee made no response, and as appellant went away he said to appellee, "Give me three days notice and I will get out." It does not appear that appellee made any response to this.

Samuel Burns, called on behalf of appellant, testified in corroboration of appellant's testimony that appellee's agent, in the latter part of May or the 1st of June, 1891, asked appellant \$100 a month for rent, and also that appellant told the agent that if the latter would give a receipt for \$75 a month he would be willing to settle up with him.

It was also admitted on the trial, by counsel for appellee, that appellant delivered the keys of the premises in question, at the office of appellee, to the latter's son, about the last of August, 1891, who took the keys and threw them under the table.

On motion of counsel for appellee, the court excluded from the jury all the evidence concerning the interview between appellee's agent and appellant with regard to the payment of rent, for the reason, as claimed by appellee's counsel, that this evidence was in no way connected with appellee.

SAMUEL J. LUMBARD and HAMLIN & BOYDEN, attorneys for appellant.

When a party is allowed to hold over after the expiration of a tenancy, by agreement, the terms on which he continues to occupy the premises are matter of evidence rather than of law, and the terms upon which the tenancy exists is considered as one for the jury. *Mayor of Thetford v. Tyler*, 8 O. B. 95; 1 *Wood on Landlord & Tenant* (2d Ed.), 32, and cases there cited.

Admitting that the landlord had a right to hold the tenant, either as a tenant for another year, or as willfully withholding possession of the premises, he can not elect to hold him as a tenant and then bring an action against him under the liquidated damage clause in the lease for holding

over. He can not affirm the tenancy and afterward treat the tenant as a tenant for sufferance merely. 1 Wood on Landlord & Tenant (2d Ed.), 38 and 39; Featherstonhaugh v. Bradshaw, 1 Wend. 134.

Very slight acts on the part of the landlord for a short length of time are sufficient to conclude his election and make the occupant his tenant. Taylor's Landlord and Tenant (7th Ed.), Par. 22.

It is a question for the jury to determine under the instructions of the court, whether or not the holding over is such as to create a new tenancy. Clinton Wire Cloth Co. v. Gardner, 99 Ill., particularly p. 165.

This action for liquidated damages is on the theory of a willful holding over, which is tantamount to an action for possession, and in an action brought for the possession of premises the tenant might show that he was in possession by virtue of some new contract or arrangement with the landlord. For that reason, therefore, the evidence relating to the amount of rent demanded by the collector, and the letter of Edwin Burritt Smith, and the other evidence, all tending to show under what terms the landlord claimed, were improperly excluded. Hamlin v. Engle, 43 N. E. Rep. 463.

It is at least questionable whether or not under the undisputed circumstances in this case, the landlord did not agree to allow the tenant to remain in these premises for a short time after the expiration of the lease, until they were re-rented, and pay rent at the old rate. Such a state of facts has been held sufficient to rebut the presumption of the holding over for the period of another year, under the terms of the old lease. Montgomery v. Willis, 63 N. W. Rep. 794.

A motion to direct a peremptory verdict should not be granted unless all the evidence, with all the inferences that can be justifiably drawn from it, is insufficient to support a verdict in favor of the party against whom the motion is made. B. & O. R. R. Co. v. Stanley, 158 Ill. 396; Foster v. Wadsworth Co., 168 Ill. 514.

The question when a motion to direct a verdict is made is, is there any material and substantial evidence, which if credited by the jury, could in law justify a verdict in favor of the other party? *Mt. Adams, etc., R. R. Co. v. Lowery*, 43 U. S. App. 408, 74 Fed. Rep. 463.

W. A. SHERIDAN, attorney for appellee.

MR. JUSTICE WINDERS delivered the opinion of the court.

We are of opinion that the exclusion by the court from the jury of the letter of Mr. Smith was error. The evidence (including this letter) tends to show that Mr. Smith was employed to settle appellee's claim against appellant for rent of the premises in question. There is no claim for rent by appellee for any time prior to the 1st of May, 1891, and the rent claimed by Mr. Smith's letter is from that date to April 30, 1892. If there was rent due from appellant to appellee for this latter period, it must have been because the relation of landlord and tenant existed between them for that period. If such relation existed, then there could be no recovery for damages under the declaration in this case, by reason of the clause in the lease expiring April 30, 1891. The evidence is that appellee demanded rent at \$100 per month, and none that he claimed \$10 per day for holding over. Smith was employed to settle the claim, which the letter says was for a year's rent. We think this evidence was competent for the jury to consider as bearing upon the question of whether appellee, after May 1, 1891, elected to hold appellant as his tenant.

We also think that the evidence of the interview between appellant and appellee's agent, which took place after May 1, 1891, tends to show that appellee had elected to hold appellant as his tenant, and should have been submitted to the jury.

In *Taylor on Landlord and Tenant* (8th Ed.), Sec. 22, the author says:

"Very slight acts on the part of the landlord, or a short

lapse of time, are sufficient to conclude his election and make the occupant his tenant."

This language is quoted with approval by the Supreme Court in *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 159, in which case the trial court submitted to the jury the question as to what was the intention of the parties regarding a new tenancy, as evidenced by their acts with reference to the holding over.

In *Griffin v. Knisely*, 75 Ill. 411, it was held that where a tenant held over, after notice from the owner that if he did so he would be required to pay an increased rental, although he objected to the terms imposed by the owner, by holding over, he became a tenant for the period of such holding. So in the case at bar, if appellee had the power to make appellant his tenant by recognizing him as such and demanding rent from him, though at an increased rate, appellee should not be allowed, after such recognition, to hold appellant for damages under the covenant in his former lease. Appellee affirmed appellant's tenancy by demanding rent. This was his right, at least, under the terms of the former lease. In any event we think this tends to show a waiver of his right to hold appellant as a trespasser and liable for \$10 per day for the time which the latter held over. Appellant was willing to be a tenant, and by the holding over was bound, at appellee's election, at least to the extent of the former lease, whether he consented or not. *Clinton, etc., Co. case, supra.*

Appellant, by remaining after the demand of the increased rental by appellee, could not be heard to say he was not a tenant at the increased rate demanded. *Griffin case, supra.*

We are of opinion that the questions as to whether appellee waived his right under the former lease to claim damages at \$10 per day, and whether there was a new tenancy created under the terms of the former lease, changed only as to the rental, viz., \$100 per month, should have been submitted to the jury, under proper instructions.

For the errors in excluding the evidence above noted and directing a verdict for appellee, the judgment is reversed and the cause remanded.



**F. H. Cooper v. Winifred B. Cooper.**

1. **TEMPORARY ALIMONY—Does Not Depend on the Wife's Property.**—Whether temporary alimony should or not be allowed does not depend upon the wife's ownership of non-income-producing property. If the income of the wife is insufficient to maintain her and enable her to carry on her suit, and that of the husband is ample, she should be allowed from his income such sum as will, when added to her own, enable her to live comfortably, pending the litigation, in the station of life to which her husband has accustomed her.

2. **SAME—Wife's Misconduct and Temporary Alimony.**—In fixing the amount of alimony the court may take into consideration the fact of the wife's misconduct, but that a less sum should be allowed her on that account, even when her misconduct has contributed to the separation of the parties, has no application to a motion for temporary alimony and suit money.

3. **SAME—Court Will Not Look into the Merits on the Hearing of a Motion for Temporary Alimony.**—The court will not look into the merits on a motion for temporary alimony, but will only investigate sufficiently to determine whether the complainant's bill is exhibited in good faith. Whether the complainant has, in fact, a meritorious case, or whether the truth in respect to the issues is on her side, can not be determined until the proof shall have been put in and a hearing had.

4. **SAME—Resting in the Discretion of the Court.**—Whether temporary alimony should be allowed, and if so, how much, are questions resting in the judicial discretion of the court, in view of the conditions and circumstances of each case, and an abuse of such discretion is necessarily the subject of review. Unless, however, there is clearly an abuse of the discretion, the decree will not ordinarily be disturbed on appeal.

**Order Allowing Temporary Alimony.**—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed November 16, 1899.

S. S. PAGE and A. BINSWANGER, attorneys for appellant.

Complainant must show that she has a meritorious case before alimony *pendente lite* can be allowed. Puterbaugh's Chancery, 639; Rawson v. Rawson, 37 Ill. App. 493; Jenkins v. Jenkins, 91 Ill. 167.

When a wife has sufficient means to maintain herself and conduct her suit, alimony *pendente lite* will not be allowed. 2 Am. & Eng. Ency. (2d Ed.), 105-6; 2 Bishop, Marriage and

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Divorce, Sec. 394; Carlin v. Carlin, 65 Ill. App. 161; Porter v. Porter, 41 Miss. 116; Kenemer v. Kenemer, 26 Ind. 330; Burgess v. Burgess, 25 Ill. App. 526; Puterbaugh's Chancery, 639; Harding v. Harding, 40 Ill. App. 202, 144 Ill. 594.

The court can take into consideration the circumstances of the case in fixing the amount of alimony. 2 Starr & Curtis, 2136; Harding v. Harding, 79 Ill. App. 612.

The court should give a less sum when wife's misconduct has contributed to the cause of separation. 2 Am. & Eng. Ency. (2d Ed.), 127.

The amount allowed by the court was excessive. Harding v. Harding, 79 Ill. App. 612.

J. ERB, attorney for appellee.

The allowance of temporary alimony is a question which addresses itself to the judicial discretion of the chancellor. Blake v. Blake, 80 Ill. 523; Foss v. Foss, 100 Ill. 576; Burgess v. Burgess, 25 Ill. App. 525; Lane v. Lane, 22 Ill. App. 529; Foote v. Foote, 22 Ill. 425.

"Whether an allowance shall be made or not in the nature of temporary alimony, rests in the judicial discretion of the court, to be exercised in view of the conditions and circumstances of each case, and an abuse of the discretion is necessarily subject to review."

Unless, however, there is clearly an abuse of the discretion, the decree will not ordinarily be disturbed on appeal. Andrews v. Andrews, 69 Ill. 609; Ressor v. Ressor, 82 Ill. 442.

While the allowance is discretionary and subject to appeal, it is only upon a strong and decided difference of opinion that an appellate court should be disposed to disturb it. Foote v. Foote, 22 Ill. 425; Burgess v. Burgess, 25 Ill. App. 525.

It must be clearly shown that there has been an abuse of discretion. Lane v. Lane, 22 Ill. App. 529.

The discretion of the lower court will not be controlled, unless the amount is so excessive as to amount to an abuse of discretion. Foss v. Foss, 100 Ill. 576.

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MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from an order allowing temporary alimony and suit money to appellee, pending a suit for separate maintenance by her against appellant, her husband. The original bill was filed October 24, 1898, and an amended bill November 17, 1898. In both the original and amended bills it is averred that August 14, 1888, the parties were married, and that October 19, 1895, appellant willfully and without cause, and without fault on the part of appellee, deserted and abandoned her, and declared he would no longer live with her; that she was living separate and apart from her husband, and that she had no property or income of her own to enable her to pay necessary living expenses and to maintain herself in a condition adapted to the station of life to which she had been accustomed. The amended bill states the circumstances under which appellee alleges the appellant abandoned her, and also acts of misconduct on the part of appellant.

It is averred in both the original and amended bills that appellant is the owner of real and personal estate of the value of, to wit, \$1,500,000; and has an annual income of about \$250,000.

The original and amended bills are both verified by the affidavit of appellee.

Exceptions were filed to the amended bill by appellant, which were overruled by the court, and appellant answered both bills.

Appellant, in his answers, denies that he abandoned appellee without cause, or without fault on her part, denies the charges of misconduct made in appellee's amended bill, and states the circumstances under which, October 20, 1898, he ceased to live with appellee. Appellant denies that he is the owner of property or has an income of the amounts stated in appellee's bills, or anything like said sums. Replications were filed to the answers. For reasons which will hereafter appear, we deem it unnecessary to state the pleadings more fully.

November 25, 1898, the court, on motion of appellee, and

on the bills and answers and affidavits in support of and against the motion, ordered that \$600 per month be paid by appellant to appellee, as temporary alimony, the first payment to be made December 1, 1898, until the further order of the court; and that appellant should also pay, for the use of appellee, the rent of the premises, number 150 Pine street, Chicago, and of the private barn adjacent thereto, until the further order of the court, and also ordered that appellant should, forthwith, pay to appellee the sum of \$1,500 as and for preliminary solicitor fees to enable her to prosecute her suit.

In appellee's affidavit in support of her motion, she states that heretofore she has been allowed by appellant, for the support and maintenance of herself and household, between \$1,500 and \$2,000 per month, in addition to which appellant paid the rent of the premises occupied by her and of the barn, and the wages of the coachman, for feed for the horses and all repairs and expenses pertaining to the barn; that appellant owns nearly thirty per cent of the stock of a business corporation in Chicago, known as Siegel, Cooper & Co., the capital stock of which is fixed at \$1,000,000, and that he is also a large stockholder in another corporation known as Siegel-Cooper Co., doing business in the city of New York, which two corporations are doing a large business and have been accumulating annually large profits, and that appellant has received large dividends on his said stock, ranging from fifteen to fifty per cent per annum on said stock, and has been receiving a salary as vice-president of \$12,000 per annum; that affiant has been reliably informed and charges, that during the last year appellant has earned in salary, dividends and undivided profits, by reason of his interest in said corporations, \$500,000, and that the market value of his stock has increased, making his total earnings and profits during the last year, at a fair estimate, \$750,000; that appellant has other large investments amounting to many thousands of dollars, the precise amount of which is unknown to affiant; that during the year 1893, appellant's dividend in Siegel, Cooper & Co., of Chicago, amounted to

\$140,286; that he withdrew cash from said concern, during said year, \$101,104.77, and has since then withdrawn from said concern other large sums each year, independent of money drawn for living expenses and the support of affiant, which sums have been devoted to outside investments; that the amounts withdrawn by appellant for personal and household expenses have been between \$40,000 and \$50,000 per annum; that appellant, after he left his home, ordered his horses, carriages and other vehicles, theretofore reserved for affiant's use, removed to the barn of Siegel, Cooper & Co., and that, when notice was served on him of the present motion, he sent her a check for \$500, with the announcement that he would not allow her any more, except the rent of the apartment she occupied and the rent of the barn, \$25 per month; that appellant is reasonably and fairly worth \$1,500,000; that affiant's available means consists of only \$10,000, which yields her less than six per cent per annum; that she has a daughter by a former marriage about sixteen years old, and that all of said income is used in the education and support of said daughter, and is insufficient for said purposes, and that no part of the income from said \$10,000 is available for affiant's use; that affiant received, as allowances toward her support and maintenance in the following months of the year 1898—March, \$1,095; April, \$500; June, \$900; July, \$805; August, \$1,500; September, \$1,000; and in addition appellant presented her with a carriage which cost \$1,015; and that said allowances did not include coachman's wages, horse feed, rent of barn, rent of living apartment and other expenses, amounting in all to \$200 per month; that appellant's dry-goods, dresses, and other articles of wearing apparel cost about \$6,000 per annum, and her household expenses amounted to \$350 per month, etc.

Appellant, in his affidavit in opposition to the motion, denies that he is possessed of property worth \$1,500,000, or anything like said sum, and denies that his annual income is \$250,000, or anything like said sum, and avers that he has been receiving a yearly salary of \$12,000, which is the

only salary he receives; that the statement that during the last year his earnings and profits amounted to about \$750,000 is absolutely untrue and a gross exaggeration; that outside of his interest in the two corporations heretofore mentioned, and his interest as stockholder in one piece of property connected with said business, he has no investment of any value to him; denies that he has received any dividend from the Siegel-Cooper Co. at any time, and avers that the allegation that he withdrew from Siegel-Cooper Co., in the year 1893, over \$100,000 is untrue; avers that since the expiration of about six months from the fall of 1896, affiant has allowed \$500 per month for household expenses, in addition to which, on special occasions, he presented appellee with divers sums of money, and paid the rent of the barn and of the living apartments, the salary of the coachman, and feed of horses; avers that he has five children by a former marriage, three of whom are single, and that he is at considerable expense on their account; that appellee is extravagant, etc.; that about November 1st last, he sent a check to appellee for \$500; that within a week prior to October 19th last, on appellee's solicitation and her representations that she was in debt, he gave her \$1,000, and that, since the suit was commenced, bills have been presented to him for debts of appellee aggregating \$557.92; that the horses and carriages are his property and he had a right to remove them, but that since said removal appellee replevied and now has them; that November 5, 1898, affiant paid to appellee \$11,000, money of appellee which she derived from her father's estate, and which she still has, as far as appellant is advised; that appellee has at least \$15,000 worth of jewelry and silverware purchased by affiant, also a farm in Iroquois county, Illinois, worth, as affiant is advised, about \$8,000, from which she receives rental; also some twenty-five or thirty town lots in the town of Sheldon, Illinois, of considerable value; also a whole or half interest in a cultivated farm of 300 acres near the city of Dallas, in Texas, of considerable value, which was purchased by affiant with his own money and

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given to appellee, and from which, affiant is informed, she receives income, but the amount thereof he does not know; also that appellee owns eleven shares of West Chicago City Railway stock of the par value of \$100 per share, on which she receives six per cent. dividends. Affiant denies that he announced to appellee, when he sent her, November 1st, the \$500 check, that the sum would be all he would allow her for her separate support, and avers that he sent her the following letter:

“CHICAGO, Oct. 31, 1898.

MRS. WINIFRED B. COOPER, 150 Pine St., Chicago, Ill.

I enclose check for \$500, your usual monthly allowance, and will continue to pay rent of flat and barn. I do this, notwithstanding your suit just begun for separate maintenance, and in doing this I do not waive any of my rights in that suit or otherwise, and deny your right to begin or sustain any such action. It is not my fault that you are living apart from me.

F. H. COOPER.”

In another affidavit filed by appellant in reply to appellee's affidavit, he denies that ever, in any year while the parties lived together, he allowed appellee, or that she expended for wearing apparel \$6,000, or any sum approximating that amount, and avers that \$500 per month, with house rent paid, is ample to cover all reasonable expenditure for appellee's living expenses of all kinds.

It will be observed from the affidavits that appellant does not disclose the value of his property, or the amount of his annual income, but simply denies that he is worth as much or has income as great as appellee in her sworn bill and her affidavit avers. This omission, his counsel say, was expedient for business reasons, which may be true, but the amount of his income was an essential fact in determining appellee's motion, and his omission to inform the court of that fact is certainly not a circumstance favorable to him. It is apparent that the appellant is very wealthy, and that appellee has, while living with her husband, been accustomed to having large amounts expended on her account. It is not denied that the amounts alleged by appellee to have been expended in the months heretofore mentioned in

1898, were expended by appellant as averred by appellee. Appellant's answer to appellee's affidavit, that in the year 1893 he withdrew \$101,104.77 from Siegel, Cooper & Co., is a negative pregnant. He says that the allegation that he withdrew over \$100,000 is untrue, impliedly admitting that he withdrew \$100,000.

It appears from the affidavits that appellant provided horses and carriages for the use of appellee, which in view of appellant's means, certainly can not be said to have been unsuited to her condition in life. Appellant's own estimate of the allowance which should be made for appellee's support is but little less than that allowed by the court. In his affidavit he says that \$500 per month, with house rent paid, is ample to cover all reasonable expenditures for the complainant's living expenses of all kinds. In his letter to appellee of October 31, 1898, written the seventh day after the suit was commenced, he says: "I enclose check for \$500, your usual monthly allowance, and will continue to pay rent of flat and barn." The court allowed \$600 per month, and the rent of the flat and barn, only \$100 more than what appellant estimated would be sufficient. It would seem that in so far as the order for temporary alimony is concerned, there is but little about which to litigate.

Counsel for appellant have filed an elaborate argument, citing numerous cases, which we can not avoid thinking unnecessary, as every principle applicable to the case is announced in the very thorough, well supported and exhaustive opinion of the court in *Harding v. Harding*, 144 Ill. 588. The propositions of appellant's counsel are as follows:

1. Complainant must show that she has a meritorious case before alimony *pendente lite* is allowed.
2. When a wife has sufficient means to maintain herself and conduct her suit, alimony *pendente lite* will not be allowed.
3. The court can take into consideration the circumstances of the case in fixing the amount of alimony.
4. The court should give a less sum when the wife's misconduct has contributed to the cause of separation.



5. The amount allowed by the court is excessive.

In *Harding v. Harding* the court say :

“The court should enter into a sufficient examination of the case to determine the good faith of the complainant in exhibiting her bill, which will ordinarily be confined to an inspection of the pleadings, of which the court may and should, if other proof be not made, require verification.”

The court further say :

“The petition is verified by the oath of the complainant. This was sufficient, if the court believed her, to warrant the exercise of the discretion of the court in finding that she was proceeding in good faith.”

The court further holds :

“It is no objection to the allowance being made that the husband denies what the wife alleges.”

In the present case not only was appellee's bill verified by her oath, but she made a separate affidavit in support of her motion for temporary alimony, and the court evidently found that her bill was exhibited in good faith. Whether temporary alimony should or not be allowed, does not depend on the wife's ownership of non-income-producing property. In the case cited the court held that if the income of the wife is insufficient to maintain her and enable her to carry on her suit, and that of the husband is ample, she should be allowed from her husband's income such sum as will, when added to her own, enable her to live comfortably pending the litigation in the station in life to which her husband has accustomed her. That the court, in fixing the amount of alimony may take into consideration the circumstances of the case, is a sound proposition, but the proposition that a less sum should be given when the wife's misconduct has contributed to the separation has no application to a motion for temporary alimony and suit money. On such motion the court will not look into the merits (2 Bishop on Marriage, Divorce, etc., Sec. 940), but will only investigate sufficiently to determine whether the complainant's bill is exhibited in good faith. Whether the complainant has in fact a meritorious case, whether the truth in respect to the issues is on her side, can not be deter-

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mined until the proof shall have been put in and a hearing had. *Harding v. Harding supra.*

Whether temporary alimony should be allowed, and if so, how much, are questions resting in the judicial discretion of the court, in view of the conditions and circumstances of each case, and an abuse of the discretion is necessarily subject to review. Unless, however, there is clearly an abuse of the discretion, the decree will not ordinarily be disturbed on appeal. *Harding v. Harding, supra.*

In the present case the wife's annual income, so far as appears from the affidavits *pro* and *con*, consists of less than six per cent on \$10,000 and six per cent on the par value of \$1,100 of stock, or not in excess of \$660 in all, while the husband's income is ample; in view of which we deem the allowance of temporary alimony fair and reasonable.

Neither can we say that there was clearly an abuse of discretion in allowing the sum of \$1,500 to complainant for solicitor's fees, or suit money, considering the issues involved, the pecuniary ability of appellant to contest the averments of the bill, and his answers, which clearly indicate that he intends so to do. In the *Harding* case the sum of \$1,000 was allowed as solicitor's fees, and \$400 additional for other expenses of suit. In the present case nothing has been allowed for expenses of suit other than solicitor's fees, and appellee may be compelled to expend, for such other expenses, some of the money awarded to her on account of solicitor's fees. The money when paid will be hers, not that of her solicitor.

The order will be affirmed.

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### Dauchy Iron Works v. McKim Gasket and Manufacturing Co.

1. LANDLORD AND TENANT—*Monthly Rent, When Due.*—Where there is no agreement that monthly rent shall be paid in advance, it is not due until the end of the month.

2. DISTRESS FOR RENT—*Not Due.*—Proceedings by distress for rent do not lie unless the rent is due.

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Dauchy Iron Works v. McKim Gasket & Mfg. Co.

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**Distress for Rent.**—Appeal from the Superior Court of Cook County; the Hon. SAMUEL C. SROUGH, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed November 16, 1899.

**Statement by the Court.**—Appellant brought distress for rent before a justice of the peace against appellee, the warrant of distraint being levied upon certain personal property in the possession of appellee on November 2, 1896. Thereafter, on the same day, appellee brought replevin in the Superior Court of Cook County against appellant for the same property. Appellant recovered judgment before the justice, from which the appellee in this court took an appeal to said Superior Court. In the Superior Court the two causes were consolidated and tried as one cause by the court, without the intervention of a jury, and separate judgments entered; in the replevin case, that appellee retain the property replevied, with one cent damages and costs against appellant, and in the distress case a judgment for costs in favor of appellee and against appellant. From these judgments the appeal in this case was taken.

The trial in the court below was had upon an agreed statement of facts, viz.:

“It is admitted that the McKim Gasket and Manufacturing Company was the owner of the goods and chattels in question on October 31, 1896.

“It is admitted that the replevin writ was issued Monday morning, November 2, 1896.

“It is admitted that the McKim Gasket and Manufacturing Company moved some of its machinery and fixtures October 31, 1896.

“It is further admitted that the Dauchy Iron Works, to prevent the McKim Gasket and Manufacturing Company from moving the balance of the goods and chattels here in question, ordered the elevator stopped at 12.30 P. M. Saturday afternoon, and that the elevator did not run from that time till 3 o'clock in the afternoon, when it recommenced to run, and continued to run during the rest of the afternoon.

“It is admitted that the McKim Gasket and Manufacturing Company had, since about the 20th day of July, 1896, been in the possession of the premises known as the sixth

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floor of the building, numbers 84 to 88 Illinois street, Chicago, Illinois. That the Dauchy Iron Works was the owner of said building. That said McKim Gasket and Manufacturing Company was in possession of said premises as the tenant of said Dauchy Iron Works, at a monthly rental of \$40 a month.

"It is admitted that the rent for a portion of July, and all of August and September, was paid on September 1, 1896. It is admitted that the October rent, at the rate of \$40, was paid on October 5, 1896.

"It is admitted that a written lease for the premises in question for the term of one year, commencing August 1, 1896, and ending July 31, 1897, at a monthly rental of \$40 a month, payable in advance, was drawn by the lessor, the Dauchy Iron Works, and left with the officers of the McKim Gasket and Manufacturing Company to be signed; and that said draft of lease was not signed at the time of delivery by the Dauchy Iron Works, and was not signed by either party at any time.

"It is admitted that the Dauchy Iron Works, as lessor, caused the distress warrant in question to be levied by its agent, Edward A. Rhodes, on Monday morning, November 2, 1896, about nine o'clock; that afterwards, and on Monday, November 2, 1896, a writ of replevin was served upon said Edward A. Rhodes, and the goods in question were taken out of his possession by said officer, under and by virtue of said writ of replevin.

"It is admitted that all rent up to and including the October rent was paid by the McKim Gasket and Manufacturing Company.

"It is admitted that no rent was paid for the month of November by the McKim Gasket and Manufacturing Company.

"It is admitted that no notice of the termination of the tenancy was given by the McKim Gasket and Manufacturing Company.

"It is admitted that on September 1, 1896, a conversation occurred between Joseph Mohr, representing the McKim Gasket and Manufacturing Company, and Samuel Dauchy, representing the Dauchy Iron Works, with reference to signing the draft of leases above referred to, at which conversation said Joseph Mohr stated that the lessee would not sign the draft leases in question, for the reason that its business was experimental, and that it did not care to commit itself to the lease until the success of the business was dem-

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onstrated, and that he informed the agent that he might want to stay there three months, or only one month, and might stay there a year, and that if the business was not successful they would move out inside of three months."

LOUIS M. GREELEY, attorney for appellant.

KRAFT & RUST, attorneys for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

From the statement of facts preceding this opinion it appears that the tenancy of appellee was, at most, a monthly tenancy at \$40 per month as rent, without any other agreement between it and appellant as to when the rent was payable. The first rent was paid on September 1, 1896, which was for a part of the month of July, and for the months of August and September, 1896. Appellee went into possession on the 20th of July, 1896. Rent for the month of October, 1896, was paid on October 5, 1896. The written lease which was prepared by appellant and left with the officers of appellee, was not signed, nor does it appear that any of its terms were assented to by appellee. Under such circumstances, and in view of the manner in which the rent was paid, it can not be said that any time was agreed upon as to when the rent was due, except that it was to be paid monthly.

When there is no agreement that monthly rent shall be paid in advance, it is not due until the end of the month. Wood's Landlord & Tenant, Sec. 450, Taylor's Landlord & Tenant, Vol. 1, Sec. 391; Dixon v. Niccolls, 39 Ill. 372.

The rent for the whole of the month of October having been paid, there was no rent due to appellant on the 2d day of November, 1896, when it distrained. It follows that the judgment in the distress case was correct.

The evidence shows no right of appellant to retain the property replevied except by virtue of the distress. The right of distress failing, for the reason that no rent was due, it follows that the judgment in the replevin suit was also correct.

If we are correct in the foregoing conclusions, it is unnecessary for us to consider in this opinion, and we do not therefore refer to, the several contentions and authorities cited by appellant's counsel.

The judgments of the Superior Court are therefore affirmed.

### Wolf Goldstein v. James P. Smith et al.

1. VERDICTS—*Of Guilty in Replevin*.—A verdict in replevin finding the defendant guilty and assessing the plaintiff's damages is equivalent to a finding of the property in the plaintiff.

2. APPELLATE COURT PRACTICE—*Insufficient Abstracts*.—An abstract in the following language—"As there is no point made on any of the evidence other than that abstracted or the rulings of the court in admitting or excluding evidence, and as the only error assigned in this court is raised on the record and the pleadings, for the purpose of saving the time of the court we do not further abstract the evidence," is tantamount to an abandonment of a contention that the verdict is excessive in amount.

3. PRACTICE—*Waiver of Irregularities in Verdict*.—Where a verdict is returned by eleven only of the twelve jurors empaneled to try the issues, and no objection is made to it upon that ground, and counsel permit it to be received without objection at the time, or upon a motion for a new trial, it can not be raised for the first time in this court.

**Replevin.**—Appeal from the Superior Court of Cook County; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed November 2, 1899.

This suit was brought in replevin by appellees against appellant. The declaration was in replevin with a count in trover added. Appellant pleaded *non cepit, non detinuit*, and property in defendant. Trial was had with a jury, and the verdict was in the following form: "We, the jury, find the defendant guilty and assess the plaintiff's damages at the sum of three hundred eighty-two and 16-100 dollars; this amount is with interest included." This verdict was signed by twelve jurors, among whom was Charles Koehnke, as appears from the common law record of the verdict and

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from the bill of exceptions. The common law record of the empaneling of the jury shows the same jury empaneled, except that in place of the name of Charles Koehnke appears the name James Roach.

Motions for a new trial and in arrest of judgment were overruled and judgment was entered upon the verdict. From that judgment this appeal is prosecuted. An additional record filed here discloses that on May 4, 1899, which was after the trial and after judgment, and at a term subsequent to the judgment term, the trial court entered an order that the record of the proceedings had on the 4th day of January, A. D. 1899, be amended by striking the name "Jas. Roach" from the record and inserting, in lieu thereof, the name of "Charles Koehnke." The order recites, in effect, that the court, having read the record, the bill of exceptions and a transcript of the stenographic notes taken at the trial, finds that the writing of the name of James Roach in the record was a clerical error; that James Roach was not one of the jurors empaneled, but that Charles Koehnke was a juror duly empaneled, and that he sat as a juror upon the trial and was one of the jurors who returned the verdict.

HOFHEIMER & PFLAUM, attorneys for appellant.

HOYNE, O'CONNOR & HOYNE, attorneys for appellees;  
HARRY D. IRWIN, of counsel.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

It is contended by counsel for appellant that the judgment of the trial court should be reversed because, first, the verdict is not responsive to the issues; second, the verdict is for an excessive amount, not warranted by the evidence; and third, the verdict was not returned by all the jurors who were empaneled and sworn to try the issues.

As to the first contention, there can be no question but that it is the rule that if a verdict varies from the issue in a

substantial matter, or if it find only a part of that which is in issue, it is bad. The verdict here is informal, and the jury should have been sent back to correct it. But we are of opinion that this informality does not bring it under the rule stated, and should not operate to work a reversal of the judgment which was rendered upon the verdict. In other words, the verdict, though not proper in form, did, nevertheless, by its finding of guilty, comprehend all the issues of fact presented by the pleadings. *Jarrard v. Harper*, 42 Ill. 457; *Nelson v. Bowen*, 15 Ill. App. 477.

In the former case the trial court, by an instruction, directed the jury that if they believed certain facts from the evidence they should find the defendant guilty. The action was replevin. It is true, as argued by counsel for appellant, that the report of this decision does not show the form of the verdict returned, but the only inference from the language of the decision is that the verdict responded in form to the instruction of the court and was a verdict of guilty only. The Supreme Court said in review that though the form of the verdict was not right, yet it was equivalent to a finding of property in plaintiff.

In *Nelson v. Bowen*, *supra*, Mr. Justice McAllister, speaking for the court, said:

"In order to recover, the plaintiff was bound to show absolute or special property in the goods, or some of them, and a wrongful conversion by the defendant. Whether there was such property in the plaintiff, and whether the defendant had wrongfully converted the goods in question, were necessarily the issues involved. A general verdict of guilty would, however, comprehend them all."

As to the second contention, viz., that the verdict is excessive in amount, we are unable to decide without an examination of the record itself. Counsel have not abstracted the evidence so as to enable us to examine it in this behalf. The abstract contains this clause:

"As there is no point made on any of the evidence other than that abstracted or to the rulings of the court in admitting or excluding evidence, and as the only error assigned in this court is raised on the record and the pleadings, for



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the purpose of saving the time of the court, we do not further abstract the evidence."

We must assume, therefore, that the counsel have abandoned the assignment of error which questions the sufficiency of the evidence to sustain the verdict as to the amount of damages assessed.

The third contention is that the verdict was not returned by the jury empaneled to try the issues. There is no question but that eleven of the jurors empaneled did return the verdict. No objection was made to the verdict when it was received upon the ground that it was returned by eleven only. When the verdict was returned, counsel permitted it to be received without any question as to the persons who returned it. Had there been any error in this respect, it might have been then corrected had objection been made. Nor was the question raised upon motion for a new trial.

We can not consider it when raised for the first time in this court.

We need not consider the additional record, showing, by a later order correcting the record, that the name of Roach was written in the record by mistake for that of Koehnke, and that the verdict was in fact returned by all twelve of the jurors empaneled.

The judgment is affirmed.

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### Cicero & Proviso St. Ry. Co. v. Gustave Richter.

1. INSTRUCTIONS—*Must be Based upon the Evidence.*—Instructions must be predicated upon the evidence in the case.

Action in Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed November 16, 1899.

VAN VECHTEN VEEDER and BENJ. F. RICHOLSON, attorneys for appellant.

KRAFT & RUST, attorneys for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

This case is before this court for the second time. On the first trial the court directed a verdict for the defendant, appellant here. The judgment was reversed and the cause remanded for another trial. (70 Ill. App. 196.) For a statement of the principal facts in the case we refer to the opinion of this court on the former appeal.

The declaration charges that appellant was negligent in operating its car at a rapid rate of speed, that the car made a great noise, well calculated to frighten any horse being driven upon the public highway, and that the loud noise necessarily made by operating the car scared, and made nervous and unusually hard to control, the horses being driven by plaintiff, which fact was then and there brought to the attention of and manifest to the servant of defendant so operating said car, but that said servant persisted in operating and running said car so that plaintiff's horses became frightened and the car collided with the horses and wagon driven by plaintiff, whereby he was thrown with great force and violence out of the wagon and upon the ground, and "was thereby then and there greatly bruised and wounded and divers bones of his body were then and there broken, and he became and was sick, sore, lame and disordered, and so remained for a long space of time," etc.

The court, among other instructions for appellee, gave the following:

"2. If, under the evidence and instructions of the court, the jury find the defendant guilty, then in assessing the plaintiff's damages the jury may take into consideration not only the loss, expenses and immediate damage arising from the injuries received at the time of the accident, if any, as shown by the evidence, but also the permanent loss and damage, if any is proved, arising from any disability necessarily and naturally resulting to the plaintiff from the injury in question, which renders him less capable of attending to his business than he would have done if the injury had not been received."

The court also refused the following instruction asked by appellant, to wit:

"3. The court instructs the jury that in arriving at their verdict they are not to consider any evidence tending to show that plaintiff's mind has become impaired as a result of the accident in question."

The court, however, modified this instruction by adding to it the words, "unless the impairment, if any shown by the evidence, is the necessary and natural result of the injury charged."

The second trial resulted in a verdict of \$2,100 in favor of appellee, upon which, after a remittitur of \$600, the court rendered judgment for \$1,500, from which this appeal is taken.

It is claimed, first, that the verdict is against the law and evidence; second, that the court erred in the admission of certain evidence, and third, that there was error in the giving, refusing and modifying by the court of certain instructions.

From a careful examination and reading of the evidence, we have reached the conclusion that the appellee has failed to establish by a preponderance of the evidence two allegations in the declaration of negligence charged, to wit, that the appellant's car was operated at a rapid rate of speed, and that the car made a great or loud noise while being operated. The clear weight of the evidence is that the car was being operated slowly immediately preceding the collision with appellee's horses and wagon, and that it made no great or loud noise.

The only remaining allegation of the declaration on which the verdict could be sustained, is that the noise made in operating the car was such as to necessarily scare and frighten any horse, make him nervous, and unusually hard to control; that the noise did scare and frighten plaintiff's horses, which fact was brought to the attention of and made manifest to the servant of appellant. The evidence bearing upon this allegation is conflicting, and we are not prepared, after a careful scrutiny of it, to hold that it fails to sustain

a liability on the part of appellant in this regard. Some complaint is made that the allegation is not sufficiently specific to sustain the verdict, but we are of opinion that the appellant, having pleaded to the declaration, can not, after verdict, urge such an objection.

The second instruction for appellee above noted is, in our opinion, erroneous, when considered with reference to the evidence in the case. Among other items of damages which the instruction allows the jury to consider is that of "permanent loss and damage" to the plaintiff "arising from any disability necessarily and naturally resulting to the plaintiff from the injury in question, which renders him less capable of attending to his business than he would have been if the injury had not been received."

There is no evidence of any permanent injury to appellee. His injuries, by way of wounds or bruises, so far as they could be observed, had been fully cured at the time of the trial. There was no evidence whatever that any mental impairment or nervousness of appellee, claimed to have been the result of his injuries, were permanent in their nature or likely to prove so. This being the state of the proof, it was error for the court to have given this instruction. The words of the instruction, "permanent loss and damage," could, in our opinion, only have been construed as meaning permanent injury. If these words are susceptible of another and different construction, then the instruction was calculated to mislead the jury, and for that reason it was erroneous.

The other instruction above quoted, being the third asked by appellant, and which was refused by the court, we think was properly refused, and in this connection may be considered the ruling of the court as to the admission of the evidence, tending to show the mental impairment of appellee, that being the only evidence admitted of which complaint is made. If there was competent evidence that appellee's mind had become impaired as the result of physical injuries received by appellee from the accident in question, then the third instruction was prop-

erly refused, and it was proper to be given as modified. The evidence as to appellee's mental impairment fails to show that it was the result of physical injuries received by him from the accident.

The witness Anna Richter, for appellee, was asked, "How does your father act since the accident?" to which she answered, "He acts to me simple." Counsel for appellant asked that the answer be stricken out, because, he claimed, it was a conclusion of the witness, and was improper because there was no specific allegation in the declaration that appellee was mentally injured. The witness was also asked, "Tell us how he appears—how he acts?" to which she answered, "He sometimes don't seem to know what he is talking about;" and also, she further stated, on being told to continue her answer (an objection being interposed which interrupted her), "He don't seem to know anything. He goes to work and does one thing and then he don't know what he is doing, and goes to work and does another thing; he forgets everything he is doing." Appellant's counsel moved to strike out this evidence of the witness, which motion was overruled, and an exception preserved. We think there was no reversible error in the court's ruling. The witness simply described, in response to proper questions, how appellee appeared to her, and how his actions appeared to her after the accident. Strictly speaking, when she said, "He acts to me simple, he don't know what he is doing, he forgets everything he is doing," she no doubt stated her conclusions from what she saw him do and the manner of his doing it, which her language was insufficient to describe. Her cross-examination shows the difficulty under which the witness labored, in that she could give only one instance of his actions on which she based her answer. An ordinary witness may give an opinion, which is the same as his conclusion, as to the mental condition of another, whether his mind was clear, or he had failed mentally in a given time; also that he acted strangely or in a childish manner. Rogers on Expert Testy., 10 and 11; 2 Jones on Evid., Sec. 362.

The evidence was, in our opinion, competent, but because

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it failed to show that appellee's mental impairment was the result of his physical injuries, the instruction as modified was erroneous.

The allegations of the declaration were sufficient to make this evidence proper. *Franklin, etc., Co. v. Behrens*, 80 Ill. App. 317, and cases there cited; affirmed by Supreme Court, 181 Ill. 340; *B. & O. S. W. Ry. Co. v. Slanker*, 180 Ill. 357, and cases there cited.

Other objections are made to instructions given by the court, which are covered by what is above said.

For the error in giving appellee's second instruction, and in giving appellant's third instruction as modified by the court, the judgment is reversed and the cause remanded.

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### **Bernard Schmelzer v. Chicago Avenue Sash and Door Mfg. Co.**

1. **MECHANIC'S LIENS**—*Owner to Retain Sufficient to Pay Sub-Contractors*.—Section 35 of the Mechanic's Lien Law (Laws 1887, 220) requires the owner to retain in his hands sufficient money to pay the sub-contractors and material-men, as shown by the statement required by such section, and payments made by him, before or after such statement, are in violation of the rights of sub-contractors and material-men, and do not affect their right to a lien.

2. **SAME**—*Unlawful Payments to Original Contractor*.—A payment to the original contractor is in violation of the rights and interests of the sub-contractor or person furnishing materials, when the owner has notice of such person's rights, either under section 80 or from the sworn statement of the original contractor provided by section 35 of said act.

3. **AMENDMENTS**—*After the Term*.—A record can not be amended after the term of court has passed at which it was made unless there are some memoranda, minutes or notes of the judge, or something appearing in the record or files to amend by.

4. **JUDGMENTS**—*Power of the Court After the Term*.—After the term at which a final judgment is rendered has passed, the court has no power over the judgment, except to amend it in matters of form or to correct clerical errors.

5. **PRACTICE**—*As to Joint Defendants*.—In actions on a contract against two or more joint defendants, when all are served, the judgment must be against all or none.

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**Assumpsit**, under the mechanic's lien law. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed November 16, 1899.

**Statement.**—Appellee, a manufacturer of mill work, brought suit against appellant and one August Knueppel. Appellant was owner and Knueppel contractor in the erection of a building for which appellee furnished material under contract with Knueppel. The suit was brought under Section 37 of the Mechanic's Lien Act, in force in 1892, which provides that a sub-contractor may either file a petition to enforce his lien against the property or may sue the contractor and owner jointly and recover a personal judgment against them. The sub-contract under which the material was furnished to Knueppel was completed on the 18th of August, 1892. On the 15th of September, 1892, a sub-contractor's mechanic's lien notice was served by appellee upon appellant, and on the 7th of November, 1892, suit was commenced. The original declaration consisted only of the common counts, and was filed on the 9th of December, 1892. Both defendants were served with summons. On the 16th of January, 1897, appellee, by leave of court, filed additional counts setting up the provision of the mechanic's lien statute above mentioned and facts intended to show the liability of defendants thereunder. Appellant alone appeared and pleaded to the declaration. The case was tried with a jury, which rendered a verdict against appellant for \$825.50, for which amount judgment was entered. The defendant August Knueppel filed no plea to the original or amended declaration and did not appear in court. He was not defaulted and there was no disposition of the case as to him, so far as is disclosed by the original transcript of the record of the Circuit Court. A subsequently filed supplemental transcript of record shows that on March 22, 1899, after the expiration of the term of court at which the judgment had been rendered, the Circuit Court entered the following order in the cause:

“On reading and filing in this cause the affidavit of

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Daniel V. Samuels, and hearing the argument of H. S. Shedd, counsel for defendant, Bernard Schmelzer, in opposition to the application for an order amending the record in this cause, and the court being fully advised in the premises, and it appearing that by reason of the omission and neglect of the clerk, the court's order of judgment, as announced and rendered on December 3, 1898, was not entered or indorsed on the file wrapper as announced, rendered and directed by the court; and it further appearing to the court that the supplying of the omissions and amending of the imperfections in said record and order of judgment would not be against the right and justice of the matter of the suit, or alter the issues between the parties on the trial, it is therefore ordered that the order of judgment be amended so as to read, 'Motion for new trial of defendant Bernard Schmelzer overruled; judgment on verdict \$825.50; on default of defendant August Kneuppel, finding by the court for \$825.50; judgment on finding.'

And by bill of exceptions the following, among other proceedings, is shown in relation to the entering of such order :

"Mr. Shedd: I will ask the court if the court has any memorandum or notes in writing in regard to the judgment entered in this case on December 3, 1898.

"The Court: The court has nothing except what is in his breast, and counsel for defendant knows as well as the court knows. I don't think he will dispute it, because it has been conceded right through here that a judgment was rendered on that finding. No question about that."

It also appears that in the Chicago Daily Law Bulletin, issued on the day following the entry of the original judgment, was this memoranda :

"109,025. Chi. Ave. S. & D. Co. v. Bernard Schmelzer and August Kneuppel, on finding, \$825.50."

And a rule of the Circuit Court is also shown, by which it is ordered that announcements of court calls in the Chicago Daily Law Bulletin shall be deemed sufficient notice to parties and their attorneys.

HENRY S. SHEDD, attorney for appellant.

DANIEL V. SAMUELS, attorney for appellee.



MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

The recovery as against appellant must be sustained, if at all, upon proof of facts set up by the first, second or third of the special counts of appellee's declaration.

The first and second of these counts allege, as the ground of the owner's (appellant's) liability, the service of a sub-contractor's notice upon him by appellee on September 15, 1892, and that there was then due and owing from appellant to Knueppel, the original contractor, \$1,000 upon his contract. The evidence is insufficient to sustain the recovery as under these allegations. For there is no evidence whatever of what the contract was between appellant and Knueppel, the original contractor, nor as to the amounts which had been paid thereon and the amount, if any, still due and unpaid upon September 15, 1892. Hence the recovery can not be sustained under either the first or second of the special counts.

The third special count proceeds upon a supposed liability under Section 35 of the Mechanic's Lien Act, as amended in 1891 and in force in 1892. This count alleges, in effect, that because Knueppel, the contractor, had not furnished to appellant, the owner, a sworn statement showing the number of persons in his employ upon the contract, and sub-contractors, with names, amounts due to such persons from the original contractor, etc., "as required by law," and because appellant made payments to Knueppel in disregard of the statute and in disregard of appellee's rights, therefore appellant "became jointly liable with said August Knueppel" to pay to appellee the said sum, etc. The question presented, in relation to this count and any liability of appellant thereunder, has been definitely settled by the decision of our Supreme Court in *Shaw v. Chicago Sash, Door & Blind Mfg. Co.*, 144 Ill. 520, which held, in effect, that under circumstances like these here obtaining there was no liability of the owner to the sub-contractor, arising by reason of the failure of the original contractor to make, or failure of the owner to require, the statement under oath

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provided for by the act. The statute under consideration in that case was the act as amended in 1887, and the provisions of section 35, as then in force, were not, in any respect, material to the question here involved, different from the provisions of the same section as amended in 1891. The court said :

“The construction sought to be put upon this clause is, that where no statement under oath is made by the contractor, every payment by the owner is illegal, and is no bar to any sub-contractor or material-man who may thereafter give notice and seek to establish his lien. Such construction, we think, is unwarranted.” \* \* \* “Section 35 merely requires the owner to retain in his hands sufficient money to pay the sub-contractors and material-men ‘as shown by the statement,’ and provides that payments made by him, whether before or after the statement is made, shall be deemed illegal and in violation of the rights of such sub-contractors and material-men, and not affecting their right to a lien. It is difficult to see how, in any proper legal sense, the rights or interests of sub-contractors or material men, notice of whose claims was not brought home to the owner by the contractor’s statement, could be affected by the payment of money by the owner to the contractor. Until service of notice, under section 30, they would have no lien, either perfected or incipient, and they would therefore have no right to the money in the hands of the owner which would be violated by its payment to the original contractor.” \* \* \* “A payment to the original contractor is in violation of the rights and interests of the sub-contractor or person furnishing materials when the owner has notice of such person’s rights, either under section 30 or from the sworn statement of the original contractor provided by section 35.”

Knueppel, the original contractor, having furnished no statement to appellant by which appellant was notified of appellee’s claim, and there being no evidence of any amount due from appellant to Knueppel when appellee served the sub-contractor’s notice, there is no ground upon which a liability of appellant, as owner, to appellee can be sustained. The verdict therefore, is not supported by any evidence which would warrant a recovery, and hence the judgment must be reversed.

There is another sufficient reason why this judgment could not be affirmed, aside from insufficiency of the evidence. The transcript of the record of the judgment appealed from, showing all proceedings down to final judgment, shows a judgment against appellant alone and none against Knueppel. Knueppel had been duly served with summons on December 30, 1892, and at the October term, 1898, when trial was had, his default might have been taken, damages assessed and judgment had against him, if a verdict and judgment therein resulted against his co-defendant. But while a verdict was returned and judgment was rendered against appellant, none was rendered against his co-defendant, Knueppel, so the record discloses. This would make the judgment against appellant alone bad. *Kimmel v. Schultz*, 1 Ill. 169; *Russell v. Horan*, 2 Ill. 552; *Dow v. Rattle*, 12 Ill. 373; *Gribbin v. Thompson*, 28 Ill. 61; *Faulk v. Kellums*, 54 Ill. 188; *Kingsland v. Koeppe*, 137 Ill. 348.

We do not regard the attempt to amend at a term subsequent to the judgment term (shown by supplemental transcript allowed to be filed here and considered by the court) as correcting the error.

It is disclosed that there was nothing to amend by. We do not regard the Chicago Daily Law Bulletin announcement of the judgment as being such a memorandum or memorial paper as the law contemplates. The rule of the Circuit Court refers only to announcements of the court calls in that paper. It appears affirmatively from the bill of exceptions that there was no memorandum or memorial paper upon which the amendment could be based, and that it was made solely from the recollection of the trial judge. The amendment could not at that time be made except as to matter of form and in affirmance of the judgment. *State Savings Inst. v. Nelson*, 49 Ill. 171; *C. & St. L. R. R. Co. v. Holbrook*, 72 Ill. 419; *Becker v. Sauter*, 89 Ill. 596; *Baldwin v. McClellan*, 152 Ill. 42.

And then only from some memorandum or memorial paper. *Coughran v. Gutheus*, 18 Ill. 390; *Gebbie v. Mooney*,

121 Ill. 255; *Ayer v. City*, 149 Ill. 262; *The C., B. & Q. R. R. Co. v. Wingler*, 165 Ill. 634.

But irrespective of this question, and upon the ground first above indicated, the judgment must be reversed and the cause remanded.

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### North Chicago St. R. R. Co. v. Henry Duebner.

1. MENTAL PAIN—*When Not a Proper Element to be Considered in Assessing Damages.*—Mental pain not directly or necessarily connected with the physical pain is not a proper element to be considered by the jury in assessing damages.

**Action in Case, for personal injuries.** Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded; Mr. Justice SHEPARD not concurring. Opinion filed December 5, 1899.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

CUNNINGHAM, VOGEL & CUNNINGHAM, attorneys for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This suit was brought to recover damages for personal injuries.

March 21, 1895, appellee was a passenger upon one of the street cars of appellant. At a little after midnight of that day his right hand was so injured that three of the fingers were amputated. The hand was thus injured by being run over by a wheel (or wheels) of the car in which appellee was a passenger.

There were two cars in the train. The front car was a motor car, and is referred to as the "Evanston car." The other car is referred to as the "Halsted street trailer." The

accident occurred on Halsted street, at or near Buckingham Place, in the city of Chicago.

On behalf of appellant it is urged that the verdict and judgment are contrary to the evidence.

If appellee stepped or fell off the *front* platform of the car so that his hand was upon the track in front of the wheels, and if he thus, by his own negligence or want of care for his personal safety, contributed directly to the injury, this contention on the part of appellant must be sustained.

Appellee testified that he fell from the *rear* platform. His testimony in this respect is supported by two witnesses called by him. On the contrary, four witnesses on behalf of appellant testify that he fell from the *front* platform. It was for the jury to consider and determine as to the conflicting statements of witnesses.

There is, however, a controlling fact outside of the statement of witnesses. Appellee swears that the wheels ran over his hand. This was a physical impossibility if he fell or stepped from the *rear* platform. There was no other car following the one which appellee was on. He says that he held with his left hand onto the rail that is on the side at the back end of the car. In stepping or falling from the rear platform and holding onto the rail, as he describes it, with his left hand, he could not possibly have reached forward far enough to put his right hand upon the track in front of the wheels of the car.

The conductor on the motor car swears that he was on the rear platform of his car; that appellee was on the *front* platform of the *trailer*; that he, the conductor, said to appellee twice, when appellee was about to step off: "One moment, please; wait until the car stops." It is nowhere denied in the record but that the conductor requested appellee to wait, just as he says he did, and that appellee did not wait as requested.

It is also contended by appellant that the court erred in the admission of testimony. That portion of appellee's examination in chief, as to which this contention is made, is as follows:

"Mr. Duebner, how much physical pain did you suffer on account of this injury? A. Well, I suffered, from the beginning to the end, over four months.

Q. How much—severe or how? A. Well, there was a good many nights I didn't sleep.

Q. Was there any time during the four months that you were entirely free from pain? A. No.

Q. Did you suffer in your mind on account of this injury? A. Well, I lost some of my mind since that suffering. (A motion to strike this answer out was overruled.)

Q. Go on. A. Well, I lose my mind for a long time; for a whole year I don't feel well.

Q. How do you mean? A. I suffer in my head.

Q. For one year after what? A. From my sickness.

Q. What sickness? A. When I got hurt in my hand, and I worry myself, I can not work any more. That was what makes me out of my mind.

Q. What further mental pain did you suffer on account of this injury besides what you have already mentioned? A. Well, I worry myself and I lost my mind sometimes."

(Objections and exceptions were duly made and preserved by appellant.)

That testimony was given more than two and one-half years after the injury complained of was inflicted. The rule as to recovery of damages for mental pain or anguish is thus very clearly stated by Mr. Presiding Justice Adams in *C. C. Ry. Co. v. Canevin*, 72 Ill. App. 81, 90:

"Now, mental pain may be the direct result or concomitant of physical pain. As the court say in *City of Chicago v. McLean*, 133 Ill. 148, 'the body and mind are so intimately connected that the mind is very often directly and necessarily affected by physical injury. There can not be severe pain without a certain amount of mental suffering.' Such mental pain as is there described is a proper element of damage, but mental pain not directly or necessarily connected with the physical pain is not a proper element to be considered by the jury in assessing damages."

The opinion in that case is supported by the authorities there cited and carefully reviewed. *I. C. R. R. Co. v. Cole*, 165 Ill. 334, 339; *Peoria Bridge Ass'n v. Loomis*, 20 Ill. 235; *C. & G. T. Ry. Co. v. Spurny*, 69 Ill. App. 549; *Bovee v. Danville*, 53 Vt. 183; *C. R. I. & P. Ry. Co. v. Caulfield*, 63 Fed. Rep. 396.

The testimony of appellee above quoted shows conclusively that he was permitted, against objection, to testify as to mental anguish as distinguished from physical pain; also as to mental anguish, or as he puts it "worry," long after the physical pain resulting from the injury had ceased. He says:

"I worry myself; \* \* \* that was what makes me out of my mind." Also that the physical pain continued four months—that he did not feel well for a year after he was hurt. After all that testimony he is asked, "What further mental pain did you suffer on account of this injury besides what you have already mentioned?"

Clearly that refers to "mental pain not directly or necessarily connected with physical pain," and is not "a proper element to be considered by the jury in assessing damages." It was therefore erroneous to overrule the objections of appellant.

There is no testimony tending to show any willful or malicious act on the part of appellant for which punitive or exemplary damages could be awarded. The only liability claimed to exist is for negligence. In such a case mental pain or anguish not directly or necessarily connected with physical pain or suffering can not be admitted as an element to be regarded in assessing damages.

Neither does it seem to us, after careful examination of this record, that the employes of appellant were guilty of negligence. But as this case must be remanded for another trial we refrain from discussing the testimony as to that question.

The judgment of the Superior Court is reversed and the cause remanded.

MR. JUSTICE SHEPARD. I do not concur.

**Chicago & E. I. R. R. Co. v. Isabella I. Wallace.**

1. INSTRUCTIONS—*Authorizing Jury to Find Verdict upon Ground of Negligence Not Alleged in Declaration.*—An instruction which authorizes the jury to find a verdict for the plaintiff upon a ground of negligence not alleged in the declaration constitutes manifest and reversible error.

2. RECOVERY—*Must be Had upon Grounds Alleged in Declaration.*—A recovery can not be had upon grounds other and distinct from those alleged.

3. PLEADING—*General Allegations in Declaration Will Not Sustain.*—A general allegation of duty and disregard thereof, without a statement of facts constituting the negligence or breach of duty, is the allegation of nothing more than a conclusion of law, which is not traversable, and will not sustain a pleading.

4. SAME—*Declaration Must State Facts.*—The declaration must state facts from which the law will raise the duty, and must also show wherein there has been a breach of it.

5. SAME—*Duty of Plaintiff in Seeking Redress.*—A plaintiff in seeking redress for an alleged injury should state the basis of his action in plain and intelligible form, agreeably to the established rules of pleading. By those rules the plaintiff is bound to show the duty, the breach, and in what it consists, and that his injury resulted as a consequence. It is only by observing such rules that the defendant can be apprised of what it is he is required to meet.

**Action in Case, for personal injuries.** Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded. Opinion filed November 21, 1899. Rehearing denied.

WILL H. LYFORD, J. B. MANN and ALBERT M. CROSS, attorneys for appellant.

SAMSON & WILCOX, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This is an appeal from a judgment against appellant, recovered in an action on the case brought by appellee to recover for injuries to her person while she was a passenger upon appellant's line of road.

It is alleged in the single count of the declaration that



plaintiff (appellee) on a certain day became a passenger in a certain train on appellant's railroad, to be carried, and accordingly was carried, from Chicago Heights to Englewood station in Chicago, for reward paid to the defendant; "and it became and was the duty of said defendant upon arrival of said train at said Englewood, the destination of plaintiff, to give plaintiff an opportunity of safely alighting therefrom, and then and there to stop said train a reasonable time, to enable plaintiff to so alight therefrom safely as aforesaid, and not to start said train while plaintiff was engaged in the act of alighting therefrom; yet defendant did not regard its said duty or use due care in that behalf, but, on the contrary, upon the arrival of said train at said Englewood station, and while plaintiff, with all due care and diligence, was in the act of alighting therefrom, the defendant carelessly and negligently caused the said train to be suddenly and violently started and moved, and thereby" plaintiff was thrown violently to the ground or platform of the depot at said station, and received the injuries complained of.

It will be observed that the only negligence charged, consists in causing "the train to be suddenly and violently started and moved."

The fifth instruction asked by appellee, and given, is as follows (the italics being ours):

"5. If you find from the evidence that on or about the 4th day of September, A. D. 1894, the defendant was engaged in the business of a common carrier, carrying passengers for hire, and that for a reward it undertook to carry and did carry, the plaintiff from its station at Chicago Heights to its station at Englewood, and you further find from the evidence that when the defendant's train, on which the plaintiff was being carried, reached its said station at Englewood, the defendant was *guilty of negligence by failing to stop its said train a reasonable time to enable the plaintiff to safely alight therefrom*; or was guilty of negligence in starting said train while the plaintiff was in the act of alighting therefrom, and as the direct consequence of such negligence the plaintiff, while exercising ordinary care for her own safety, was by reason of the starting or moving of said

train thrown violently to the ground and received the injuries charged in her declaration, or any of them, then you should find the defendant guilty and assess the plaintiff's damages at such a sum as will reasonably compensate her for the pain and disability, if any, which you find, from the evidence, she has incurred in the past, or will incur in the future, on account of said injuries."

The portion of the instruction which we have italicized, authorizes the jury to find a verdict for the plaintiff upon a ground of negligence not alleged in the declaration, and constitutes manifest and reversible error.

A recovery can not be had upon grounds other and distinct from those alleged. *Wabash, St. L. & P. Ry. Co. v. Coble*, 113 Ill. 115; *Chicago, B. & Q. R. R. Co. v. Bell*, 112 Ill. 360.

Counsel for appellee argue that "a specific statement of a duty followed by the charge that it was neglected, is exactly equivalent to a charge that a duty was neglected," and, as we understand them, apply their proposition to the case in hand, by insisting that because it is charged in the declaration that it was the duty of the defendant upon the arrival of the train at the destination of the plaintiff to stop the train a reasonable time to enable the plaintiff to alight therefrom safely, and that the defendant did not regard its duty or use due care in that behalf, a complete charge of negligence in such respect was made.

It is well understood that a general allegation of duty and disregard thereof, without a statement of facts constituting the negligence or breach of duty, is the allegation of nothing more than a conclusion of law, which is not traversable, and will not sustain a pleading. *Ward v. C. & N. W. Ry. Co.*, 61 Ill. App. 530.

The declaration must state facts from which the law will raise the duty. *Ayers v. Chicago*, 111 Ill. 406.

There must not only exist, in this class of cases, a duty by the defendant, but the declaration must show wherein there has been a breach of it. The duty alone may arise as a matter of law out of the facts pleaded, but the facts constituting the breach must be stated. So, in *Went-*

worth's Pl., Vol. 8 (Ed. of 1798), p. 406; 2 Humphrey's Precedents, 801 (Ed. of 1845), and Chitty's Pl., p. 648 (7th Am. Ed.), cited and relied upon by appellant, following the general charge of a breach of duty, the breach constituting the specific negligence complained of, is, in Wentworth, the deviation of the vessel from its direct and customary route; in Humphrey, the overturning of the coach, and, in Chitty, the upsetting and throwing down of the coach.

"It is not asking too much that a plaintiff in seeking redress for an alleged injury, should state the basis of his action in plain and intelligible form, agreeably to the established rules of pleading. By those rules the plaintiff is bound to show the duty, the breach, and in what it consists, and that his injury resulted as a consequence." Ward v. C. & N. W. Ry. Co., *supra*.

It is only by observing such rules the defendant can be apprised of what it is he is required to meet.

In the case at bar, the duty to stop the train a reasonable time to enable the plaintiff to alight is alleged, and so is the duty not to start the train while the plaintiff was in the act of alighting.

Probably every duty so specifically alleged by the declaration, arose and would be implied as matter of law from the averment that plaintiff was a passenger being carried from one station to another, for hire or reward paid, and that the specific allegations of duty were superfluous. West Chicago Street R. R. Co. v. Coit, 50 Ill. App. 640.

But whether arising from the law, or from the specific allegation, the only duty which the facts pleaded shows a breach of, or negligence concerning, is in respect of suddenly and violently starting the train while plaintiff was in the act of alighting, and the instruction authorizing a recovery for a different breach was erroneous.

For the error indicated the judgment is reversed and the cause remanded.

**John McGary v. West Chicago St. R. R. Co.**

1. INSTRUCTIONS—*When Erroneous*.—Where a plaintiff sustained injuries through the joint action of a street car company and the driver of a wagon, it is error to instruct the jury that if they believe that the injury resulted through the want of care of the driver of the wagon, then the plaintiff can not recover, ignoring the question of contributory negligence of the railroad company.

2. TORT FEASORS—*Joint Feasors Severally Liable*.—A person contributing to a tort, whether his fellow-contributors are men, natural or other forces or things, is responsible for the whole, the same as though he had done it without help.

3. ORDINARY CARE—*Of Street Car Company Toward Strangers*.—The law requires ordinary care of a street railway company toward strangers, but does not require such extraordinary care as may be under some circumstances necessary to avoid running into vehicles upon its tracks.

Action in Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed December 5, 1899.

THATCHER & GRIFFEN, attorneys for appellant.

An instruction is erroneous which disregards the doctrine of the joint liability for tort, and asks the jury to pass upon the question as to whether a person who is not a party to the suit is guilty of negligence. *St. Louis Bridge Co. v. Miller*, 138 Ill. 475; *Village of Carterville v. Cook*, 129 Ill. 152; *Consolidated Ice Machine Co. v. Keifer*, 134 Ill. 481; *West Chicago St. R. R. v. Feldstein*, 69 Ill. App. 37; *Wolff Mfg. Co. v. Wilson*, 46 Ill. App. 384.

ALEXANDER SULLIVAN, attorney for appellee; EDWARD J. McARDLE, of counsel.

Statement.—This is an action to recover for personal injuries. While appellant was standing on a street crossing midway between the street car track and the sidewalk waiting to take passage on one of appellee's cars, a wagon belonging to one Palmer, started to cross the tracks in front

of an approaching cable train. Before the wagon had cleared the crossing it was struck by the cable car with force such as to throw the wagon box clear of the rails, striking appellant, and inflicting the injuries complained of. The suit was originally brought against both the owner of the wagon and appellee, but at the conclusion of the plaintiff's case, the jury were instructed to find the former not guilty, which was done. Subsequently, appellee's evidence having been introduced in defense, the cause was submitted to the jury and a verdict returned finding appellee not guilty.

MR. JUSTICE FREEMAN delivered the opinion of the court.

It is urged that the sixth instruction given at the instance of counsel for appellee is erroneous. That instruction is as follows :

"The court instructs the jury that if they believe from the evidence that the injury herein complained of resulted through the want of care, if any, of the driver of the wagon in question, then the plaintiff can not recover, and the jury must find for the defendant, the West Chicago Street Railroad Company."

It is said that even if the driver of the wagon had been guilty of negligence, such negligence would not excuse the railroad company from the consequences of its own negligence, if any there was. The instruction does not tell the jury in express terms that if the injury complained of had been caused exclusively through the want of care of the driver of the wagon, then the plaintiff can not recover from the appellee. It in effect states that if the driver of the wagon was guilty of any negligence, causing the injury, then no matter how negligent the railroad company may have been, nor how much such negligence may have contributed to the injury, still said company is not liable. This evidently is erroneous. It is said in *St. Louis Bridge Co. v. Miller*, 138 Ill. 475, that "the rule is well settled, 'that a person contributing to a tort, whether his fellow-contributors are men, natural or other forces or things, is responsible for the whole, the same as though he had done all without help.'" The injury might have resulted in the case at bar from the carelessness of the wagon driver in getting in

the way of the cable train. But if it had been also directly caused by willful or negligent conduct of appellee's employes in running into the wagon, it would not be correct to instruct the jury that in such case the verdict must be for the defendant. The fact that both may have contributed to the injury would not necessarily relieve either. It is unimportant to the party injured which contributed most. *West Chicago St. R. R. Co. v. Feldstein*, 69 Ill. App. 36; *Consolidated Ice Machine Co. v. Keifer*, 134 Ill. 481.

Counsel for appellee insist that the seventh instruction given at their instance cures any error in the one preceding, and that together they correctly state the law applicable to the evidence. This seventh instruction tells the jury that if they "believe from the evidence that either the plaintiff or the driver of the wagon were negligent, and that such negligence was the cause of the injury herein complained of, then they should return a verdict of not guilty; or even if the jury believe from the evidence that the defendant was guilty of negligence, still if they also believe from the evidence that the plaintiff was guilty of negligence which helped in any way to bring about the accident," etc., then they should find the defendant not guilty.

The first part of this instruction contains substantially the same error as the sixth instruction, and the second part does not remove the objection. It was not correct to tell the jury that the negligence of either the plaintiff or the driver of the wagon relieved the defendant from the consequences of any negligence of its own.

Appellant's counsel urge that the second instruction requested by them was improperly refused. We do not concur in this view. The law requires ordinary care of the appellant toward strangers, but does not require such extraordinary care as may be, under some circumstances, "necessary to avoid running into vehicles" upon its tracks.

As the case must be sent back for another trial, we have avoided any comment upon the evidence. For the reasons indicated, the judgment of the Superior Court must be reversed and the cause remanded.

In re Estate of George Wincox.

In re Estate of George Wincox, Deceased.

1. **PRACTICE—Advancing Cases on the Docket.**—A trial court may, in its discretion, for good and sufficient cause, direct that a case be advanced and tried out of the regular order on the docket (R. S., Ch. 110, Sec. 17), and unless it appears that there has been an abuse of discretion working manifest injustice, it will not be disturbed by a reviewing court.

2. **ADMINISTRATION OF ESTATES—Power of Administrators to Collect.**—An administrator to collect of the estate of a deceased person, is authorized only to collect and secure the property of the deceased until letters testamentary or of administration are issued.

3. **SAME—Power to Pay Debts and Claims.**—An administrator to collect has no authority to pay a widow's award, undertaker's services, attorney fees, physician's bills or the like, as charges against the estate he represents.

4. **SAME—Authority.**—An administrator to collect has no authority except to collect and preserve the estate of the deceased until the probate of his will or until administration is granted.

5. **SAME—No Power to Discount Notes.**—An administrator to collect has no right or authority to sell notes of the estate, or to accept payment thereof before maturity.

**Proceedings in Probate.**—Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed December 5, 1899.

**Statement.**—George Wincox died intestate December 10, 1893. Pending a contest over the validity of an alleged will made by the deceased, one Albert Ellinger, was, March 20, 1894, appointed administrator to collect of the estate by the Probate Court of Cook County, and he having resigned, the same court, December 1, 1894, appointed Joseph Salomon in his place as administrator to collect, and letters were issued to Joseph Salomon that day.

February 8, 1897, Jesse Holdom was appointed administrator in due course by said Probate Court, and letters of administration issued to him. March 4, 1897, Joseph Salomon, as administrator to collect, filed in said Probate Court his account with said estate, which is as follows:

85	613
1896	445
85	613
108	450
85	613
e208s	130

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In re Estate of George Wincox.

To the Hon. C. C. Kohlsaat, Judge of said Court:

The following is a full, true and complete account of all the receipts and expenditures of Joseph Salomon, administrator to collect:

## RECEIPTS.

## CASH.

This administrator charges himself as follows:

Received from Albert Ellinger, administrator to collect.....\$ 6,857 02

## NOTE.

Received note mentioned in inventory in item 1. 20,000 00  
Received five coupon notes thereto attached.... 3,000 00

Total.....\$29,857 02

## EXPENDITURES.

Widow's award paid Mrs. Jennie Wincox,  
(voucher 1).....\$1,855 00  
Rogerson & Son, undertakers,..... 145 00  
Stenographer (voucher 3)..... 5 00  
Bulkley, Gray & More (vouchers 4, 5 and 6).... 122 51  
Mary Ohman, nursing deceased (voucher 7).... 235 00  
Physician in last illness..... 20 00  
Mrs. Stowell..... 100 00  
Administrator..... 1,000 00  
Attorney's fees, subject to court's order..... 1,750 00

Total expenditures.....\$5,030 65

## RECAPITULATION.

Total receipts.....\$29,857 02  
Total expenditures..... 5,030 65

Balance.....\$24,826 37

Respectfully submitted,

JOSEPH SALOMON.

The above was duly verified by said Joseph Salomon.

Objections to said account were filed by the heirs January 28, 1898. An order was entered by the Probate Court reciting that it appeared from the account of Joseph Salomon that there was due from him the sum of \$24,826.37, and it was ordered that the said sum of \$24,826.37, so admitted to be due, be paid to Jesse Holdom, administrator, upon demand, and that the further hearing upon the objec-



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In re Estate of George Wincox.

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tions to the balance of the account be continued. From this order no appeal has been taken or prosecuted. February 9, 1898, the Probate Court, after hearing all of the parties in interest on the objections filed to said account, made the following order :

“And now, on this day, pursuant to the order entered herein on the twenty-eighth day of January, A. D. 1898, came on for further hearing the objections filed herein to the final account of Joseph Salomon, administrator to collect *de bonis non* of said estate, all parties being present in court, as heretofore recited in the said order of January twenty-eighth, aforesaid, and the court having diligently examined said account and heard oral and documentary evidence in relation to the several items thereof on the part of the said administrator as well as said objectors, and also having heard the arguments of counsel for the respective parties in interest, and the court, being now sufficiently advised in the premises, finds there is no evidence in this cause tending to show that said deceased left a widow him surviving; that the evidence does show that said Joseph Salomon has mismanaged said estate and its assets, sold the note of Kathrina Chatroop for \$20,000, with its unpaid interest coupons, long before maturity, and on or about December nineteenth, A. D. 1895, and appropriated the proceeds thereof, together with the other money appearing from his account to have been by him received from Albert Ellinger, the former administrator to collect, of said estate, to the individual use of himself and his attorney, Moses Salomon, and is not by reason thereof, entitled to any allowance for either administrator's commissions or attorney's fees, and that the same ought not to be allowed, and that said Joseph Salomon, by reason of the premises hereinbefore recited, and the statutes of this State governing like cases, is chargeable with interest on all of said moneys from the time the principal note of Kathrina Chatroop for \$20,000 matured, viz., February eighth, A. D. 1897.

“The court further finds that as to the items of eighteen hundred and sixty-five dollars (\$1,865), alleged to have been paid to one calling herself Jennie Wincox, as a widow's award, the item of one hundred dollars (\$100) to Mrs. Stowell, and one thousand dollars (\$1,000) retained by said Joseph Salomon as and for his fees and commissions as administrator, and the item of seventeen hundred and fifty dollars (\$1,750), alleged to have been paid for fees of the attorney of said Joseph Salomon be and

the same are disallowed, and the objections filed thereto sustained, and thereupon it is ordered that said items of \$1,865, \$100, \$1,000 and \$1,750, aggregating the sum of \$4,715, be charged by said administrator against himself in a new account to be filed by him herein instant, with interest thereon from February eighth, A. D. 1867, at the lawful rate of five per cent per annum, and said administrator failing so to do, the court doth here state such account for him and charges said items, aggregating said sum of \$4,715 against him, said Joseph Salomon, together with interest thereon at the rate aforesaid, and doth find that said Joseph Salomon, as such administrator of said estate, has now in his hands, of moneys belonging to said estate and which are legally chargeable against him as such administrator, as follows:

"Amount shown due by account filed and ordered by the court to be paid on January 28, 1898..	\$24,826 37
Items to which objections have been sustained as aforesaid.....	4,715 00
Interest on both of said amounts, aggregating \$29,541.37, at five per cent per annum from February 8, 1897, to date.....	1,477 06

Making a total amount of.....\$31,018 43  
which the court finds said Joseph Salomon as such administrator is chargeable with, and which sum is rightfully and equitably due from him to the estate of said George Wincox, deceased. And as to the remaining objections filed herein the same are hereby overruled and disallowed.

"It is therefore ordered by the court that said Joseph Salomon do pay forthwith unto Jesse Holdom, administrator of the estate of said George Wincox, deceased, the said sum of six thousand one hundred ninety-two and 6-100 dollars (\$6,162.06) and that upon paying the same, together with said sum of \$24,826.37, found due by order of January 28, 1898, aforesaid, and ordered thereby to be paid, he be discharged from further liability and the sureties on his official bond be released.

"Thereupon the said Joseph Salomon prays an appeal to the Circuit Court of Cook County as to the items of \$1,865, \$100, \$1,000 and \$1,750, to which the objections were sustained as aforesaid, and the item of \$1,477.06 of interest, all of said items aggregating the sum of \$6,192.06, which is allowed on said Joseph Salomon giving bond with sufficient surety, to be approved by the court, in the penalty of

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twelve thousand three hundred and eighty-four dollars and twelve cents (\$12,384.12), within twenty days from this date."

A trial was had in the Circuit Court before Judge Clifford, without a jury, June 30, 1898, and the Circuit Court entered the following order:

"Now on this day, this cause coming on to be heard before the court without a jury, and the court having heard oral and documentary evidence on the part of all the parties to said cause, and also having heard the arguments of counsel for the respective parties in interest, and being now sufficiently advised in the premises, finds as a matter of law that the said item of \$1,865, alleged to have been paid to one calling herself Jennie Wincox, as a widow's award, is not a proper credit in the account of the appellant, Joseph Salomon, administrator to collect, of the estate of George Wincox, deceased, and that therefore it is not necessary to hear evidence or pass upon the question of whether or not the said George Wincox left a widow in the person of the alleged Jennie Wincox, or whether or not said administrator to collect has paid said sum or any part thereof to the alleged Jennie Wincox. The court declines to hear any evidence and pass upon the question whether Jennie Wincox was the widow of George Wincox.

"And the court further finds from the evidence introduced that said Joseph Salomon, appellant and administrator to collect, of the estate of George Wincox, deceased, has mismanaged said estate and its assets, disposed of the note of Kathrina Chatroop for \$20,000, bearing six per cent interest, with its unpaid interest coupons, long before maturity, at a discount, and on or about December 19, 1895, appropriated the proceeds thereof, together with other money, appearing from his account to have been received from Albert Ellinger, former administrator to collect of said estate, to the individual use of himself and his attorney, Moses Salomon, and of the Chicago Architectural Iron Works, a corporation in which they are officers and stockholders, and is not by reason thereof entitled to any allowance for either administrator's fees, commissions or attorney fees, and that the same ought not to be allowed, and that said Joseph Salomon, by reason of the premises hereinbefore recited, and the statutes of this State governing like cases, is chargeable with interest on all of said moneys from the time the principal note of said Kathrina Chatroop for \$20,000 matured, viz., February 8, 1897.

"It is therefore ordered by the court that the finding and judgment of the Probate Court of Cook County, Illinois, be and the same is in all respects affirmed, and the said appellant, Joseph Salomon, administrator to collect, of the estate of George Wincox, deceased, is hereby ordered to account for and pay over to the appellee, Jesse Holdom, administrator of the estate of George Wincox, deceased, the following sums of money, viz.: \$1,865 alleged to have been paid to a woman calling herself Jennie Wincox; \$1,000 claimed by said appellant for fees and commissions as administrator to collect; \$1,750 claimed to have been paid for attorney's fees; \$100 alleged to have been paid to Mrs. Stowell; together with interest upon all of said items from February 8, 1897, to date, and also upon the sum of \$24,526.37 ordered by the Probate Court of Cook County to be paid by said administrator to collect on January 28, 1898, and not appealed from, at the rate of five per cent per annum from February 8, 1897, to the date of said order, viz., January 28, 1898, said interest, all told, amounting to the sum of \$1,534.25.

"It is therefore ordered by the court that the said Joseph Salomon, administrator to collect, of the estate of George Wincox, deceased, do forthwith pay unto Jesse Holdom, administrator of the estate of George Wincox, deceased, the said sum of \$6,249.25, together with the costs of this appeal in this behalf expended, to be taxed, and that this order be certified to the Probate Court of Cook County.

"Motion for new trial overruled and exception.

"And the said Joseph Salomon excepts to the foregoing and prays an appeal.

"Thereupon the said Joseph Salomon prays an appeal from the judgment of this court charging him with said items of \$1,865, \$100, \$1,000, \$1,750, and the said interest item of \$1,534.25, aggregating the sum of \$6,249.26, to the Appellate Court of Illinois, within and for the First District thereof, which is allowed upon the said Joseph Salomon giving bond in the penal sum of \$8,000, with sureties to be approved by the court, within twenty days from this date, together with his bill of exceptions herein, within sixty days from this date."

From this last order this appeal is prosecuted.

The Circuit Court, on motion of the attorneys for Jesse Holdom, administrator, set the cause for hearing in advance of many other cases then upon the docket of said Circuit Court.

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Before the trial of said cause was commenced appellant moved the court to refer the same to a master in chancery to take an accounting, which motion was denied.

The Circuit Court also declined to hear testimony upon the question as to whether one Jennie Wincox was the widow of deceased.

FRANK A. WHITNEY, attorney for appellant.

BULKLEY, GRAY & MORE, attorneys for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

We shall not attempt to consider in detail and severally each of the numerous points presented by counsel for appellant or to pass upon them *seriatim*.

It is contended on the part of appellant that the Circuit Court erred in setting this cause for trial out of its regular order. No statute is referred to and no case is cited to support this contention.

The trial court may, in its discretion, for good and sufficient cause shown, direct that a case shall be advanced and tried out of the regular order in which it may be placed upon the docket. (Rev. Stat., Ch. 110, Sec. 17.) Unless it appears that there has been an abuse of such discretion which works manifest injustice, it will not be interfered with by a reviewing court. *Clark v. Marfield*, 77 Ill. 258. It does not appear in the case at bar that any injustice was done to appellant by advancing this case. On the contrary, the conscientious judge who tried this case did his duty and should be commended therefor, not criticised.

There is no such accounting in this cause as that it was error not to refer the case to a master. There was in fact no accounting. The only question upon the appeal was as to whether five specified items should be charged to appellant in his accounting. There was no question as to the amount of each of said items, or as to what they were for.

One of the items included in this appeal, and which was

not allowed to appellant in his accounting, is the sum of \$1,865 alleged by appellant to have been paid by him to Jennie Wincox as widow's award.

Appellant was appointed administrator to collect. He was not authorized by order of the Probate Court to pay any or either of the items which he now claims should be allowed to him. He had no authority as to payment of widow's award or claims unless the law vested in him such authority.

The statute concerning the appointment of administrators to collect says that the appointment shall be "to collect and preserve the estate of any such decedent until probate of his will, or until administration of his estate is granted." (Rev. Stat., Ch. 3, Sec. 11.)

The letters issued are that such an administrator may "collect and secure" the property of deceased "so that the same "may be preserved" for those legally entitled thereto. (Sec. 12.)

The bond such an administrator is required by statute to give is conditioned that he shall "deliver to the person or persons authorized by the court, as executor or administrator, to receive the same," all goods, etc., which shall come to his possession. (Sec. 13.)

Sec. 17 provides that:

"On the granting of letters testamentary or of administration, the power of such collector, so appointed, shall cease, and it shall be his duty to deliver on demand all property and money of the deceased which shall have come to his hands or possession \* \* \* to the person or persons obtaining such letters; and in case any such collector shall refuse or neglect to deliver over such property or money to his successor when legal demand is made therefor, such persons so neglecting or refusing, \* \* \* shall forfeit all claims to any commission for collecting and preserving the estate."

To what extent the Probate Court may authorize expenditures by an administrator to collect it is not important here to inquire, for the reason that that court did not enter any order authorizing appellant to make any expenditures whatever.

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Neither under the statute nor by order of court, was appellant authorized to disburse any part of the estate. He was by his appointment and under the statute just what he calls himself in his account filed in the Probate Court, an administrator to collect, and only that. When he assumed the right to pay out any money belonging to said estate he did so at his peril.

Much stress is placed upon the fact that appraisers were appointed by the Probate Court, who fixed the amount to be allowed as widow's award, which was approved by that court. But that was not an award to any particular person. It does not purport to be an award to said Jennie Wincox. Appellant must have known that the claim that she was the widow of said George Wincox was being contested by the heirs. It would appear from his affidavit that Moses Salomon, brother of and attorney for appellant, knew that the claim of said Jennie Wincox that she was the widow of said George Wincox, was based upon an alleged common law marriage. But as appellant had no right or authority to pay a widow's award to anybody, it is, as affecting this case, immaterial whether said Jennie Wincox was or was not the widow of George Wincox. It follows that the trial judge did not err when he refused to hear testimony upon the question as to whether said Jennie Wincox was such widow.

As we understand it the claim of appellant to be allowed \$1,750 for attorney's fees is for that sum alleged to have been paid to Moses Salomon. We notice in this record that when the \$20,000 note described in appellant's inventory was paid, \$2,000, part of the proceeds, was applied in part payment of a personal debt due from said attorney to H. H. Walker. The balance of \$18,208.90 was paid by three checks, all payable to the order of said attorney, M. Salomon, and by him indorsed. Whether these facts establish the crime of embezzlement, as urged by counsel for the administrator, we do not assume to determine.

Said \$20,000 note had not matured. Said attorney negotiated for the payment thereof and received all the pro-

ceeds. Appellant had no right or authority whatever to sell said note or accept payment thereof prior to maturity. This said attorney must, of course, have known to be the law. There was no error in refusing to allow appellant said attorney's fees.

It seems that the whole amount of the proceeds of said note, except the \$2,000 paid on account of M. Salomon's personal indebtedness, viz., \$18,208.90, went to the corporation known as the Chicago Architectural Iron Works. Of that corporation said attorney, Moses Salomon, is president; appellant, Joseph Salomon, is vice-president, and Leo Salomon, another brother, is secretary and treasurer. All three are directors and stockholders. We do not find from the record that appellant holds any obligation executed by said corporation for the repayment of said sum of \$18,208.90, or any part thereof, or any security therefor. Neither does it appear that he holds any note or security for the \$2,000 paid on account of an individual debt owing by said attorney Salomon, or that said attorney has ever executed any note or other evidence of indebtedness or given any security for the payment of said sum to appellant or to said estate. While such facts would not affect the question as to the legal liability of appellant, they have a bearing upon the question of allowing commissions.

It was not error to disallow the claim of appellant as administrator for \$1,000 commissions. To have allowed him commissions upon money wrongfully collected and appropriated, in the manner shown by this record, would have been wrong. The statute provides (Ch. 3, Sec. 17) that "in case any such collector shall refuse or neglect to deliver over such property or money to his successor when legal demand is made therefor" he shall forfeit all claims to any commissions. Demand was made upon appellant by his successor, and appellant neglected to deliver or pay over as the statute required. He thus forfeited all claim to any commissions.

The same record of the Probate Court which shows the appointment of appellant, also shows that the order there-



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tofore entered, allowing the claim of Mrs. Stowell for \$100, was vacated and set aside. And yet it is here contended that appellant has paid that claim, and that it should be allowed to him. Attorney for appellant, in his printed argument, refers to the pages in the record showing that this claim was filed and afterward allowed, but fails to note the fact that the order allowing such claim had been vacated. Appellant should not have paid it, and such payment can not be allowed in his accounting.

There was no error by the trial court in disallowing each and every of the four items alleged to have been paid out by appellant, viz., for widow's award \$1,865, commissions to appellant \$1,000, attorney fees \$1,750, and claim of Mrs. Stowell \$100. Neither was there any error in charging appellant interest amounting to \$1,534.25.

It is stated by attorney for appellant, in his printed argument, and it is emphasized by being there printed in italics, that "not one cent has been unaccounted for."

It seems to be the idea of the writer of the argument for appellant that because it is shown when the appellant permitted a portion of said estate to be abstracted, and by whom and how, and when he had illegally used and misappropriated the balance, therefore he was not guilty of any culpable misconduct.

That argument is unique, when taken in connection with the facts of this case. The judgment of the Circuit Court is affirmed.

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### George Vorass v. Alvin J. Rosenberry.

1. MASTER AND SERVANT—*Liability for Medical Attendance.*—The master is not bound to provide a servant with medical attendance.

2. PARENT AND CHILD—*Parent's Liability for Physician's Services.*—A parent is not liable for medical services rendered to a son who has attained his majority, in the absence of some contract to that effect, expressed or implied.

**Assumpsit**, for medical services. Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Verdict and judg-

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ment for plaintiff; error by defendant. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed December 5, 1899.

GILBERT & GILBERT, attorneys for plaintiff in error.

A parent is not liable to third parties for the board and necessities of his adult children in the absence of an express promise to pay for the same. *Mercer v. Jackson*, 54 Ill. 397; *Blachley v. Laba*, 63 Ia. 22; *Crane v. Baudouine*, 55 N. Y. 256; *Boyd v. Sappington*, 4 Watts, 247; *Mills v. Wyman*, 3 Pick. 207; *Norris v. Dodge*, 23 Ind. 190; *Wood v. Gill, Coxe (N. J.)*, 449; *Schouler's Domestic Relations*, par. 269, p. 400.

A master is not bound to provide medical attendance for either a menial or an adult servant, and this rule is well settled. *Schouler's Domestic Relations*, par. 468, 710; *Wenell v. Adney*, 3 B. & P. 246; 2 *Parsons on Contracts*, page 41; *Wood on Master and Servant*, Sec. 99, p. 193; *Sellen v. Norman*, 4 C. & P. 80; 19 *Eng. Law Reports*, 284; *Denver, N. & R. G. R. Co. v. Iles*, 53 Pac. Rep. 222; *Davis v. Forbes*, 51 N. E. Rep. 20.

HERBERT S. DUNCOMBE, attorney for defendant in error, contended that the obligation of the parent to maintain the child continues until the latter is in a condition to provide his own maintenance. 2 *Kent Com.* 190; *Hunt v. Thompson*, 3 *Scam.* 179; *Murphy v. Ottenheimer*, 84 Ill. 39; *Hillsborough v. Deering*, 4 N. H. 87.

By common law unemancipated children have a perfect right to support from their parents, and the parent has a right to the services and earnings of the child so long as the latter remains under his control. *Hillsborough v. Deering*, 4 N. H. 87; *Dawes v. Howard*, 4 *Mass.* 97; *Freto v. Le Favour*, 4 *Mass.* 675; *Benson v. Remington*, 2 *Mass.* 113; *Whipple v. Dow*, 2 *Mass.* 415.

Where the children remain with the parent after attaining their majority the presumption is, they remain on the same terms previously existing between them. *Freeman v. Freeman*, 65 Ill. 106; *Byers v. Thompson*, 66 Ill. 421; *Mor-*

ton v. Rainey, 82 Ill. 215; Griffin v. First Nat. Bank, 74 Ill. 259.

Where a son continues to work for, live with and receive support from his father after his majority just as he did before, he is not emancipated. *Brown v. Ramsay*, 5 Dutcher, 117; *Hillsborough v. Deering*, 4 N. H. 86; *Poultney v. Glover*, 23 Vt. (8 Washb.) 328; *Steel v. Steel*, 12 Pa. St. 64; *Overseers of the Poor of Alex. v. Overseers of the Poor of Bethlehem*, 1 Har. (16 N. J.) 121; *Rex v. Offchurch*, 3 T. R. 116; *Rex v. Whitton*, 3 T. R. 355; *Rex v. Collingbourne*, 4 T. R. 199; *Rex v. Roach*, 6 T. R. 251, 247; *Wall v. Wall*, 69 Ill. App. 389.

The simple fact that the child arrives at the age of twenty-one does not of itself emancipate him. If the son, with unbroken continuance, remains a member of the parent's family as he did before, he is not emancipated. *The Overseers of the Poor of Alexandria v. Overseers of the Poor of Bethlehem*, 1 Har. (16 N. J.), 121, and citations.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

July 13, 1897, the defendant in error, who was a practicing physician, was called by a stranger to attend upon George Vorass, Jr., a son of plaintiff in error. He found the son in an unconscious condition in the middle of the street, where he had fallen from a wagon and fractured the left thigh bone. He was removed to the house of plaintiff in error, accompanied by defendant in error, who continued to treat him for between two or three months. There is no controversy as to the amount of the claim of defendant in error. The only question is as to the liability of the father to pay for the services thus rendered.

The son had arrived at the age of twenty-one a short time prior to his injury. He lived at his father's house as a member of the family after attaining his majority, and worked in and about the business of the father the same as before.

Defendant in error was a stranger to, and was never

employed by plaintiff in error. There is testimony tending to show that plaintiff in error did not desire to have defendant in error attend the son, and that the son insisted upon retaining him. A jury was waived, and the cause submitted to the court for trial. The court found the issues in favor of plaintiff (defendant in error), overruled a motion for a new trial, and entered judgment against plaintiff in error. To review that judgment this case is brought to this court.

At the trial the court was asked to hold the following propositions of law, viz.:

"First. The court holds that there is no legal liability resting on the parent to pay the expenses attending the sickness of his child, incurred after the latter has become of age, even though the child is residing with the parent and working for him."

"Third. The court holds there is no implied liability on the part of the master for medical attendance upon his servant, even though the injuries which made such attendance necessary were induced while in the employ of the master and residing with him."

The court refused to hold said propositions of law, and each of them, as requested, but modified the same by adding to each the following :

"But if a child or servant, working for and living in the family of the parent or employer, is injured in the line of his employment, needing the immediate attention of a physician or surgeon, and the latter is called to minister to the wants and immediate necessities of the injured person who is directly brought to the family home and the physician or surgeon accompanies the injured person there, and the parent or master accepts the professional services of such physician or surgeon, and permits him to come and to continue the treatment, without notifying him that he would not be responsible for such services, he is legally liable therefor under such circumstances."

Whether the son, after attaining his majority, was employed by the father and served him as an employe, or whether he served the father without pay as a son and member of the family, were contested questions of fact. What the finding of the court was upon these questions is not disclosed by the record.

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Chancellor Kent pronounces the better opinion to be that the master is not bound to provide a servant with medical attendance. (2 Kent Com. 261.) It is believed that this is now the settled rule. (D. & R. G. Ry. Co. v. Iles, 53 Pac. Rep. 222; Davis v. Forbes, 171 Mass. 548, 553.)

It may be said that the authorities are not entirely in accord upon the question of the liability of a parent for medical services rendered to a son who has attained his majority. The apparent conflict arises mainly, if not entirely, from the materially differing facts in the several cases.

In the case of Mercer v. Jackson, 54 Ill. 397, the question as to a son's emancipation was urged by counsel as it is in the case at bar. The facts can not all be found in the report of that case. But the court holds that, the son being of age, the father is not legally liable to pay the expenses of his sickness.

The modification, as shown, of propositions of law presented by plaintiff in error, were erroneous. Even if this be not so under some authorities, as to the proposition relating to parent and child, it seems that under the authorities it is certainly so as to the proposition relating to master and servant.

The judgment of the Circuit Court is reversed and the cause remanded.

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**Hartford Deposit Co. v. J. Vernon Calkins and Alfred L. Jones.**

1. **DAMAGES**—*There Must be Reasonable Efforts to Make the Injury as Light as Possible.*—The law imposes upon a party subjected to injury from a breach of contract, the active duty of making reasonable exertions to render the injury as light as possible.

2. **SAME**—*When a Person Permits Operation Without Objection.*—A person can not recover for damages to his business or property from the erection of a structure which he permits to go on, knowing that it is going on, and without making every reasonable effort and taking active steps to prevent the damage or have it stopped.

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**Action for Damages**, for injuries done to the plaintiff's premises. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed conditionally. Opinion filed December 5, 1899.

**Statement.**—Appellant erected a fourteen-story fireproof office building upon premises adjoining those of which appellees are in possession as lessees. Upon the dividing line was a party wall, and it became necessary to strengthen the foundations of this, and run steel columns up through channels cut into said party wall in order to support the additional weight of the new structure. A party wall agreement for this purpose is said to have been made. It was discovered, as the channels for the steel columns were being cut, that as the old wall grew thinner with each story, the channels in question would break through into certain rooms on the third and fourth floors of appellees' building, which was four stories high and was occupied as a hotel. It is claimed that this discovery was made before appellees came into possession of the hotel as tenants, and that an agreement was made with the then tenant that all the rooms, seven in number, on the north side of the hotel, should be closed, and that when the work was done the tenants should be reimbursed for the loss of these rooms at the accustomed rates.

Appellees claim that they knew nothing of this arrangement, and that when they took possession no holes had been cut; that when this work was subsequently done without their consent the dust, smoke and cold air admitted through the openings resulted in continuous damage to their property and business. They claim to have made frequent complaints, and that finally an agreement was made that appellants should pay them for all damage to property or business resulting from the work, of which appellees themselves were to keep the account. It is claimed that the conditions complained of continued for more than six months.

These claims advanced on behalf of appellees are disputed and the evidence is irreconcilably conflicting.

It appears from appellees' evidence that while they claim they were suffering daily damage, they made no effort and did nothing to protect themselves therefrom, being content to complain to appellant. It also appears from the evidence that by shutting off the sky-light and scuttle leading to the attic, and the seven rooms directly affected, from the rest of the house, which it appears could have been easily and effectively accomplished, the injury alleged to have been caused by smoke and dirt and cold to the rest of the house could have been prevented. In excuse for not doing this, one of the appellees testified that some one, either the contractor or a foreman for the new building, told them not to touch it at all, and that it would be necessary for it to remain that way until the building was finished.

When this condition of things had continued for about six months, appellees sent, through their attorney, a letter containing an itemized statement of the alleged damages. By this statement in addition to the damages claimed for loss of the use of the seven rooms directly affected, appellees also state a claim as follows: "Damages caused the balance of their building from smoke, noise, dust and dampness, and the expense of additional coal and help to keep the house comfortable, \$1,000."

CHAS. H. BALDWIN, attorney for appellant.

A person, knowing that his property and business are being damaged continuously, is not justified in refraining from stopping the damage when it is in his power by reasonable effort to do so, on the plea that the person causing the damage has directed him not to make such effort to stop the damage. *Miller v. Mariners' Church*, 7 Me. 51; *Cook v. Soule*, 56 N. Y. 420; *Hamilton v. McPherson*, 28 N. Y. 72; *Loker v. Damon*, 17 Pick. 284.

HENRY T. HELM and JOHN B. BRADY, attorneys for appellees.

MR. JUSTICE FREEMAN, after making the foregoing statement, delivered the opinion of the court.

It is urged, as ground for reversal of the judgment ap-

pealed from, that the court erred in giving to the jury the following instruction :

"The jury are instructed that a person can in no case recover for damages to his business or property which he permits to go on, knowing that it is going on, and without making every reasonable effort and taking active steps to prevent it or have it stopped. If you believe from the evidence that plaintiffs knew that their premises were being damaged, and that they permitted the damage to continue, when by their own efforts the damage might have been stopped or prevented, then the defendants are not liable for the damage so caused, and plaintiffs can not recover in this suit for any such damage, unless the jury further believe from the evidence that the defendant directed the plaintiffs not to do so."

The last clause, "unless the jury believe from the evidence that the defendants directed the plaintiffs not to do so," was added by the court in modification of the instruction, as requested by appellees' counsel.

The instruction as presented to the court, and before its modification, stated, we think, substantially, the correct rule of law, and was applicable to the case in view of the evidence.

The law required that appellees should make reasonable efforts at least to protect themselves from unnecessary injury, and they can not recover damages occasioned by their own neglect. In *Hamilton v. McPherson*, 28 N. Y. 72-76, it is said by Judge Selden :

"The law for wise reasons imposes upon a party subjected to injury from a breach of contract the active duty of making reasonable exertions to render the injury as light as possible. Public interest and sound morality accord with the law in demanding this; and if the injured party, through negligence or willfulness allows the damages to be unnecessarily enhanced, the increased loss justly falls upon him."

It is said in *Hogle v. N. Y. C. & H. R. R. Co.*, 28 Hun, 363, "if it were in the plaintiff's power, by reasonable efforts, to prevent the increase of the wrong, he should use that power." To the same effect are the cases, *Miller v. Mariners' Church*, 7 Me. 51-55; *Mather v. Butler Co.*, 28 Ia. 253-259; *Town Co. v. Leonard*, 46 Kans. 354-358.



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The modification complained of is, we think, erroneous. We find no evidence tending to show that the "defendant directed the plaintiffs not to" make any effort to prevent the damages alleged to have been caused to the latter's premises generally by smoke and dust and cold weather. The testimony of one of the appellees is that the latter did not make any effort to shut off the exposed rooms from the rest of the building, because they were told they could not do so by the contractor or a foreman. But the witness is not positive that the contractor did so tell him, and there is no evidence that either the contractor or any foreman had, or pretended to have, authority to so represent the appellant. The contractor testifies that he had no foreman, and that the work was all sublet. No reason appeared why the rooms in question could not readily have been shut off from the rest of the house. Such statement, if made, could not justify appellees in neglecting their plain duty of protecting themselves, so far as they reasonably could, from unnecessary damage.

The contractor was originally a party defendant, but appellees dismissed as to him at the close of the evidence.

The erroneous instruction, however, could not, we think, have been prejudicial as to any part of the verdict, except the item of \$1,000 claimed by appellees for the alleged damages to the rest of their building from smoke, noise, dust and dampness, and for the expense of additional coal and help to keep the house comfortable.

If, therefore, the appellees shall within ten days file in this court a remittitur for \$1,000, the judgment of the Circuit Court will be affirmed for the balance. Otherwise it will be reversed and the cause remanded.

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**Jonathan W. Brooks v. Charles E. Funk.**

1. EVIDENCE—*Books of Account Under the Statute.*—The character of a book, to be offered in evidence as an account book, is not changed by our statute, but only the character of the evidence is changed, which is necessary to its admission.

Assumpsit, for commissions. Appeal from the Superior Court of Cook County; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed December 5, 1899.

ULLMANN & HACKER, attorneys for appellant.

CHARLES L. MAHONY and H. L. HANLEY, attorneys for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This suit was commenced by appellee to recover an amount alleged to be due from Brooks & Clark, as commissions on sales made by him under the following contract:

“CHICAGO, January 2nd, 1892.

Messrs. Brooks & Clark, agents for the Pasteur-Chamberland Filter Company, Dayton, Ohio, hereby agree to pay Charles E. Funk a commission of eighteen per cent on list price of all filters sold by him, or his agents, at 93 Madison street, Chicago, until May 1st, 1892, said commission to be paid when the accounts are settled by the purchaser.

BROOKS & CLARK.”

The defendant Brooks alone prosecutes this appeal.

Messrs. Brooks & Clark were called upon to produce their books of account, but they did not do so. It appears from the testimony that the books had been destroyed in a fire in appellee's office. No effort whatever was made to prove their contents. At the trial appellee testified that he kept books of account. He is then shown a book which he said is the order book with the record of sales, and that the entries therein were made at the time of the sales. That is the only book produced at the trial.

Appellee also testified in his direct examination that a portion of the book is in the handwriting of his clerk, who, at the time of the trial, was in Iowa—that he knew that the entries were true and just—and that after looking at those entries he could state from memory that the sales were made as therein put down. He was then permitted to testify as to many sales said to have been made. Then,

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and without any further testimony as to said order book, the same was offered and admitted in evidence against the objection of appellant.

Upon cross-examination, appellee testified that he could remember the sale of only one filter—that as to the numerous items appearing in that book, where the name of his clerk or of Mr. Clark is marked, he had no independent recollection—and that he had practically nothing to do with those transactions.

The declaration in this case is upon the contract above set out. That contract provides for the payment of commissions on the list price of all filters sold by appellee. There are numerous articles named in the order book offered in evidence other than filters, such as tubes, wrenches, different sized jars, spanners, coolers, gaskets, etc. There are also various items recorded in said book, and offered in evidence, which form no part of an account. The names of Brooks and Clark nowhere appear in it. There does not purport to be, and there is not, any item of debit or credit in it. Appellee testifies that defendants are entitled to certain credits, but those do not appear in said book.

That book is what it is called by appellee—and what it purports to be—an order book, and that only. It contains a record of orders for filters and other things, some of which appear to have been delivered and some not. It is wanting in most of the forms and elements constituting an account book. Appellee testifies that he kept books of account. But they were not produced or their absence accounted for. And the order book offered in evidence is in no proper sense an account book. The character of a book, to be offered in evidence as an account book, is not changed by our statute, but only the character of the evidence is changed, which is necessary to its admission. Said order book should not have been admitted.

It appears from the record that F. B. Clark was one of the firm of Brooks & Clark, which executed said contract. He is also named as one of the defendants in this case. He was never served with process and never entered his appear-

ance. But the judgment is against both of said defendants. Such a judgment can not be sustained.

There is no testimony aside from said order book upon which to found a verdict.

The judgment must therefore be reversed and the cause remanded.

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### Manchester Fire Assurance Co. v. Mary Ellis.

1. *INSURANCE—Waiver of Proofs of Loss.*—The insured submitted his proofs of loss to the agent of the company, and was informed that such proofs were all right, and was offered six hundred dollars in settlement, after which he went away, saying that he would submit the proposition to his wife, leaving the proofs of loss, to which no objection had been made, with the agent. *Held*, that the act of the agent was a waiver of the right to insist upon proofs, under the condition of the policy.

*Assumpsit*, on a policy of insurance. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. *Affirmed*. Opinion filed December 5, 1899.

GEORGE S. STEERE, attorney for appellant; H. W. WAKELEY, of counsel.

JOHN C. TRAINOR, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is an appeal from a judgment rendered against appellee upon a policy of life insurance.

It is first urged, as ground for reversal, that the suit was prematurely brought.

The policy provides that the assured shall, in case of loss, submit proofs within sixty days, stating certain facts, which it is said it is necessary for the company to know to determine its attitude toward the claim for loss. It is also provided that the loss shall not be payable "until sixty days after the notice, ascertainment, estimate and satisfactory

proof of the loss" are received by the company. It is said such proofs must be "satisfactory to the insurer, or at least such as the policy requires," and that if the proofs first submitted are not so satisfactory, and the objections are pointed out, the alleged defects must be corrected, and if this is not done by the assured he forfeits his claim; and that until such corrections are made the claim of the assured is not perfected, and the sixty days for making payment begin to run from that date. It is said that in this case the suit was brought upon the fifty-ninth day after the proofs were finally perfected, whereas the loss was not payable until sixty days thereafter. Appellant claims that the proofs were not finally perfected until April 20th, whereas it is claimed by appellee that the proofs were furnished April 15th.

The only evidence upon the question is that in behalf of appellee. Appellant introduced no evidence. The evidence tends to show that the loss was conceded by appellant's agent, after examination, to be total; that when the proofs were submitted to him, about April 15th, he said they were all right, and offered to settle the claim for six hundred dollars; that this proposition the witness—appellee's husband—said he would submit to his wife, and he went away, leaving the proofs of loss, to which no objection had been made, with the appellant's agent. When the witness called again to try to come to some settlement, the agent again offered six hundred dollars; the witness again took the matter under consideration, and the agent then told him the proofs of loss were all right, but he had better have his wife (the appellee) acknowledge the document. The witness took it, had it acknowledged and sworn to, and brought it back to the agent on or about April 20th.

Appellant's counsel, in his reply brief, says: "If there was a waiver of proofs, appellee's rights were then fixed, and as regards proofs, nothing more need to be done." He questions, however, whether the evidence will bear that construction, and this because appellee's husband, acting apparently as her agent in the matter, did subsequently,

when requested to have the document constituting the proofs of loss acknowledged by his wife, comply with the request.

We do not think, in view of all the evidence, that this is a fair conclusion. The acceptance of the proofs, as submitted, the statement that they were all right, the admission that the agent had been out to examine, and that the loss was total, and the offer then and there of a certain sum in settlement, must be regarded as an acceptance of the proofs as submitted, and a waiver of other requirements in reference thereto. The subsequent compliance with the request to have the acknowledgment of the wife appended did not change the situation. The company had accepted the proofs as sufficient when they were first brought in, and the sixty days within which the loss was payable began to run from that time. The claim had therefore matured when the action was brought, and it was not premature.

It is urged that the proofs, as so accepted by the company, were not proper proofs, and that no appraisalment was had, as required by the policy. But for the reasons above stated, we are of opinion that the evidence shows a waiver of any such objection. No request for other or different proofs of loss was ever made by appellant; no objection to those furnished was ever made, and if they were insufficient, it does not appear that appellant ever discovered the fact until this suit was brought. Appellant was at liberty to waive proofs entirely, if it saw fit to do so, and clearly did waive the informalities now complained of. There is evidence that appellant's agent told appellee "it was a total loss, and there is nothing to be appraised."

It is claimed that there is no evidence of the value of the property at time of the fire.

The evidence in this respect is not entirely satisfactory. But there is evidence already referred to tending to show that the agent of the appellant had accepted the proofs of loss, which he had sworn to, containing an itemized list of articles claimed to have been destroyed, footing up over fourteen hundred dollars, considerably more than the amount

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of the verdict. This document was admitted in evidence, and the appellee testified that the items showed the cost of the articles, and that they had been in use about eighteen months. She claimed the value of the furniture to be about fourteen hundred dollars, and the jury awarded eight hundred.

We regard the evidence, in the absence of any testimony to the contrary, as sufficient to justify the verdict. The jury seem to have allowed over six hundred dollars from the cost price for depreciation in value through eighteen months use, and we can find no fault with their conclusion.

Appellee's counsel urges that his client should have been allowed interest upon the amount of the verdict from the time when the loss was payable, and that the trial court refused to so instruct the jury. But no cross-errors are assigned, and we can not consider the alleged error.

The judgment of the Circuit Court is affirmed.

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85	637
107	1621

**Conrad Seipp Brewing Co. v. Henry Peck and Luke T. O'Brien.**

1. *VERDICTS—Capricious and Arbitrary.*—A verdict should be consistent with at least some legitimate theory of the evidence, or with what the evidence tends to prove, and must rest upon some sound principle; where it is not warranted by any legitimate interpretation of the evidence, or of what may be fairly inferred from the evidence, it ought to be set aside.

2. *SAME—When Illogical.*—Where there is no middle ground upon which the jury can determine the question in controversy, and where, under the evidence, the plaintiff is either entitled to a verdict for the amount claimed, or is not entitled to recover at all; a verdict for a part of the plaintiff's claim is illogical.

*Assumpsit*, on a promissory note. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed December 5, 1899.

WINSTON & MEAGHER, attorneys for appellant.

A verdict supported by the evidence of neither party is

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inconsistent and absurd, and can not stand. Thompson on Trials, Vol. 2, Sec. 2606; St. Louis Brewing Co. v. Bode-  
mann, 12 Mo. App. 573; Lowry v. Orr, 1 Gilm. 70; Tilley  
v. Spalding, 44 Ill. 80; Koester v. Esslinger, 44 Ill. 476;  
Hallberg v. Brosseau, 64 Ill. App. 520; Cody v. Commercial  
Fire Ins. Co., 13 Ill. App. 112.

CHURAN & SABATH, attorneys for appellee Peck.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The appellant, as plaintiff, entered judgment by confes-  
sion, upon a promissory note signed by the appellees, in  
pursuance of a power of attorney attached to the note.  
Afterward the appellees, as defendants, were given leave to  
plead to the *narr.*, and upon trial by a jury a verdict in  
favor of appellant for \$100 was returned, and judgment  
was rendered upon the verdict.

Appellant appeals from such judgment in its favor. The  
note was for \$300, with interest at six per centum for about  
two years and ten months, less an admitted credit of \$50  
and interest thereon.

The verdict of \$100 finds no basis whatever in the evi-  
dence. Had the jury found in favor of the defendants we  
might not say there was not evidence that tended to support  
such a conclusion. But the evidence in support of the  
defense went to the whole note and not to a part of it.  
There was no middle ground upon which the jury might  
compromise. Under the evidence appellant was either enti-  
tled to a verdict for the amount due upon the note, or was  
not entitled to recover at all.

So, when the jury found the issues in favor of appellant  
they found that appellant was entitled to a recovery, and  
they should have assessed its damages at the amount due  
upon the note. They could not rightfully say appellant  
was entitled to recover, but it should have only a fraction of  
what was due. Under the evidence all or nothing was due.

Nothing that is contained in the evidence, or in the  
instructions given to the jury in the form of an oral



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charge (by stipulation of parties), can account for the verdict.

A jury has no right to render a capricious and arbitrary verdict in total disregard of the facts. A verdict should be consistent with at least some legitimate theory of the evidence, or what the evidence tends to prove, and must rest upon some sound principle; and where it is not warranted by any legitimate interpretation of the evidence, or of what may be fairly inferred from the evidence, it ought to be set aside. *Cody v. Commercial Fire Insurance Co.*, 13 Ill. App. 110; *Wolf v. Goodhue Fire Insurance Company*, 43 Barb. 400.

The judgment will be reversed and the cause remanded.

**John S. Ahlgren et al. v. Edward J. Huntington, Assignee, et al.**

85	639
100	*664

1. **VOLUNTARY ASSIGNMENTS—Scope of the Deed.**—When a debtor reaches the point where he is ready and determined to yield the dominion of his property, and makes an assignment for the benefit of his creditors under the statute, the effect of such assignment is to convey and surrender all of his estate not exempt by the law to his assignee, for the benefit of all his creditors; and no matter in how many ways his performance of this intention may be carried out, the law will regard all his acts having for their object and effect the disposition of his estate, as parts of a single transaction.

2. **ASSIGNEE—Power to Avoid Fraudulent Conveyances.**—An assignee can not, for the benefit of creditors, avoid a fraudulent conveyance made by the assignor before the general assignment. He is not the representative of the creditors, but the agent of the assignor for the distribution of the property assigned.

3. **SAME—Powers Under the Statute.**—Section 11 of the Voluntary Assignment Act makes it the duty of the assignee to sue for and recover in his own name as assignee "everything belonging or appertaining to said estate, real or personal."

4. **SAME—Rights of Creditors in Case of Neglect.**—Upon the neglect or refusal of an assignee to take proper proceedings to protect the trust estate or reduce it to possession and gain its control, the right of the creditors to come into court and protect their interests can not be denied.

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**Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed December 5, 1899.**

**L. C. COOPER, attorney for appellant.**

**HERBERT S. DUNCOMBE, attorney for appellee Peterson.**

**MITCHELL & ADDINGTON, attorneys for other appellees.**

**MR. JUSTICE FREEMAN delivered the opinion of the court.**

This is a bill in which it is sought to subject to the provisions of an assignment for the benefit of creditors, certain real estate conveyed by a trust deed by Charles G. Isacson, one of the appellants, to secure three promissory notes payable respectively to three others of the appellants, one of whom was Isacson's son, and another the trustee to whom the conveyance was made.

The bill charges that at the time said notes and trust deed were executed, said Charles G. Isacson was insolvent, and was intending and prepared to make an assignment for the benefit of his creditors; that said trust deed was made in contemplation of making said assignment; and that both instruments were drawn and executed upon the same day; that they were prepared at the office of the same attorney and acknowledged before the same notary; and that the two constituted an assignment with preferences, contrary to the statute. The bill prays that the trust deed and notes thereby secured be declared null and void, and that appellee Huntington, as assignee, may be declared entitled to said real estate.

A motion was made to dismiss the appeal and strike the original depositions from the transcript of record. In the view we take of the merits, it will be unnecessary to consider these motions.

It is claimed that the insolvent debtor, having promised to secure his indebtedness to appellants Ahlgren and Levin, requested them to meet himself and wife at the office of his attorney, where the notes and trust deed in controversy were executed and delivered. The parties then separated,

and the insolvent states that immediately thereafter he met a brother-in-law who told him he had made a mistake; that his other creditors would hear of the trust deed and at once close him up. Thereupon the two returned to the office of Isacson's attorney, and Isacson was advised to make an assignment, which he did.

The controversy is not, as stated by appellant's counsel, merely whether the trust deed and notes shall be set aside, but whether they shall be declared invalid as preferences and the property subjected to the assignment. The decree is not abstracted so far as we can discover, but appellants' counsel states that the court confirmed the master's report and entered a decree in favor of the assignee.

It is urged that "a careful reading of the testimony must lead to the conclusion that Isacson did not contemplate making an assignment when he executed the trust deed and notes in question."

We can not agree with this contention. There is evidence tending to show Isacson stated upon examination in the County Court, that at the time he made the trust deed he intended to make the assignment the next day. He testified before the master that he "was hard up and could not very well get along," and was being pressed for money by some of the creditors whom he attempted to prefer by the trust deed. He states, it is true, that when subsequently advised to make an assignment he did not know what it meant, and did not want to do it. But the assignment followed within a few hours of the execution of the trust deed upon the same day; and while he may not have understood the exact character of an assignment, he evidently did know that its force and effect would be to turn over his assets for the benefit of his remaining creditors, as he had by the trust deed turned over his real estate for the benefit of three of them alone. It is said in *Preston v. Spaulding*, 120 Ill. 206-217, that when the debtor "reaches the point where he is ready and determined to yield the dominion of his property, and makes an assignment for the benefit of his creditors under the statute

\* \* \* the effect of such assignment shall be the surrender and conveyance of all his estate not exempt by law to his assignee" for the benefit of all his creditors; and no matter in how many ways his performance of this intention may be carried out, "the law will regard all his acts having for their object and effect the disposition of his estate, as parts of a single transaction." *Hanford Oil Co. v. First Nat. Bk.*, 126 Ill. 584-591; *Hide & Leather Bank v. Rehm*, 126 Ill. 461-465.

The two acts—the execution of the trust deed and the assignment—which effected a disposition of Isaacson's property for the benefit of his creditors, must be regarded under the circumstances as parts of one transaction, valid as an assignment, but invalid as a preference. We think the evidence warranted the finding of the master and the decree of the court in accordance therewith.

It is said the assignee can not maintain this bill.

It has been held in this State that an assignee can not, for the benefit of creditors, avoid a fraudulent conveyance made by the assignor before the general assignment; that the assignee is not the representative of the creditors, but the agent of the assignor for the distribution of the property assigned. *Bouton v. Dement*, 123 Ill. 142-150.

In the present case it is not sought to set aside a fraudulent conveyance made before the assignment, but to subject property irregularly conveyed at the time of and as a part of the assignment to its provisions. This the assignee has a right to do.

Section 11 of the voluntary assignment act, makes it the duty of the assignee to sue for and recover in his own name, as assignee, "everything belonging or appertaining to said estate, real or personal." In *Preston v. Spaulding*, *supra*, it is stated, "that such is the right and duty of the assignee admits of no doubt;" and it is held that upon his neglect or refusal to take proper proceedings to protect the trust estate or reduce it to possession and gain its control, the right of the creditors to come into court and protect their interests can not be denied. In the case at bar the

bill is filed by the assignee and creditors jointly. Appellant makes no objection so far as the creditors are concerned. We see no reason why the bill can not be maintained by the assignee. If the latter seeks to recover property belonging to the estate, either at law or equity, he must resort to the courts having jurisdiction of the appropriate remedy, and competent to afford adequate relief. *Davis v. Chicago Dock Co.*, 129 Ill. 180-194.

This is what has been done here. The conveyance in question was invalid under the assignment law, as a preference. As a part of the transaction constituting the assignment for the general benefit of creditors, it passed no title against the assignee. It is the right and duty of the assignee to have that fact ascertained and declared, and the irregularity in the conveyance corrected, in order that the real estate in controversy may be subjected to the assignment and administered with the other assets.

The judgment of the Circuit Court must be affirmed.

### West Chicago St. R. R. Co. v. Hugo Luleich.

85	648
d99	5

1. FALSE IMPRISONMENT—*Probable Cause for an Arrest.*—The fact that a person has counterfeit coin in his possession, with intention to utter or pass the same, or to permit, cause or procure the same to be uttered or passed, with intention to defraud any person or body politic or corporate, knowing the same to be counterfeit, furnishes probable cause for his arrest.

2. MASTER AND SERVANT—*Arrests by Servants—Scope of Authority.*—It is not essential to the liability of the master that the servant should be authorized, either expressly or by implication, to do the very act for which the master is sought to be made liable.

3. SAME—*The Subject Illustrated.*—Where A, the owner of a wagon, employs B to drive it in his business, and while doing so B drives recklessly or carelessly, by reason whereof the wagon collides with another vehicle, injuring it and some of its occupants, A is liable, not because he authorized B to drive recklessly or carelessly, which he did not, but because B was acting within the general scope of his authority, which was to drive the wagon in his employer's business. Having authorized B to drive the wagon, he is as responsible for his negligent driving as if

he himself had been driving and guilty of the negligence which caused the accident. In legal contemplation, he acted by B.

4. **STREET CAR COMPANIES—*Authority Over Passengers.***—A street car company, as a common carrier of passengers, has power to expel from its trains persons who are disorderly to the inconvenience and annoyance of other passengers, they refusing to desist from such disorderly conduct, and persons who refuse to pay their fare.

5. **SAME—*Authority of Conductors.***—A street car company can only exercise its power over passengers by an agent, who is usually, if not uniformly, its conductor. It therefore authorizes the conductor to exercise such power, and in so doing he must act in accordance with his own judgment. If he removes a passenger from the car wrongfully, or in an unlawful manner, the company is responsible.

**Trespass, for false imprisonment.** Appeal from the Superior Court of Cook County; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed November 27, 1899.

VAN VECHTEN VEEDER, attorney for appellant.

Causing the arrest of a passenger is outside of the scope of a conductor's duty. *Lafitte v. New Orleans C. & L. R. Co.*, 43 La. Ann. 34, 12 L. R. A. 337; *Central R. R. Co. v. Brewer*, 78 Md. 394, 27 L. R. A. 63; *Little Rock T. & E. Co. v. Walker*, 40 L. R. A. 473, 45 S.W. Rep. 57; *Poulton v. London & S. W. Ry. Co.*, L. R., 2 Q. B. 534; *Allen v. London & S. W. Ry.*, L. R., 6 Q. B. 65; *Edwards v. London & N. W. Ry. Co.*, L. R., 5 C. P. 445; *Charleston v. Tramways Co.*, 36 Weekly Rep. 367.

Authority of an agent to cause an arrest can not be implied. *Dally v. Young*, 3 Ill. App. 39, 41; *Allen v. London & S. W. Ry. Co.*, L. R., 6 Q. B. 65, 69; *Carter v. Howe Machine Co.*, 51 Md. 290; *Springfield E. & T. Co. v. Green*, 25 Ill. App. 106; *Cleveland Co-op. Stove Co. v. Koch*, 37 Ill. App. 595; *Govaski v. Downey*, 100 Mich. 429, 435; *Murrey v. Kelso*, 38 Pac. Rep. 879, 10 Wash. 47; *Mali v. Lord*, 39 N. Y. 381; *Hershey v. O'Neill*, 36 Fed. Rep. 168.

CHARLES LANE and B. F. IBACH, attorneys for appellee.

A common carrier undertakes absolutely to protect its passengers against the misconduct or negligence of its own servants, employed in executing the contract of transporta-

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tion and while acting within the general scope of their employment. *Steamboat Co. v. Brockett*, 121 U. S. 637; *Stewart v. R. R. Co.*, 90 N. Y. 588; *Ry. Co. v. Flexman*, 103 Ill. 546.

It is not necessary that the particular act of the servant complained of be expressly authorized or ratified by the master. It is enough that at the time of committing the wrong the servant was engaged in the performance of the master's business, and was acting within the general or apparent scope of his employment. *Chicago City Ry. Co. v. McMahon*, 103 Ill. 485; *Ry. Co. v. West*, 125 Ill. 320; *Ry. Co. v. King*, 77 Ill. App. 581; *Hanson v. Ry. Co.*, 75 Ill. App. 474; *Craker v. Ry. Co.*, 36 Wis. 657; *Eichengreen v. Ry. Co.*, 96 Tenn. 229; *Rounds v. Ry. Co.*, 64 N. Y. 129 (134); *Camp v. Hall*, 39 Fla. 535.

A common carrier is liable for the act of its conductor in causing the arrest of a passenger while in the performance of his duties as a conductor. *Palmeri v. The Manhattan Ry. Co.*, 133 N. Y. 261; *Mulligan v. Ry. Co.*, 129 N. Y. 506; *Gillingham v. Ry. Co.*, 35 W. Va. 588; *Ry. Co. v. Henry*, 55 Kans. 715; *Hamel v. Ferry Co.*, 25 N. Y. St. Rep. 153; *Hamel v. Ferry Co.*, 125 N. Y. 707; *Eichengreen v. Ry. Co.*, 96 Tenn. 229.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment for \$800 in an action of trespass for false imprisonment.

The uncontroverted facts are as follows: The appellee, who was a resident of Hammond, Indiana, was in the city of Chicago on Sunday, December 6, 1896, and, between seven and eight o'clock in the afternoon of that day, boarded a grip car of appellant, which was operated by cable. The front part of the grip car was unenclosed, the rear part enclosed. Appellee got on the open part of the car, near to the gripman, and the conductor of the car shortly thereafter came from the enclosed part of the car and demanded from appellee his fare, when appellee gave to the conductor a coin of the denomination of one dollar,

and the conductor gave to appellee ninety-five cents in change. Within a few minutes thereafter appellee went into the enclosed part of the car, and shortly afterward the conductor approached him and told him that he had given to him, the conductor, a bad or counterfeit dollar, and produced and exhibited to appellee a dollar which he said was the one he had received from him. The latter denied that the dollar shown to him was the one which he had given to the conductor, and insisted that the dollar which he had given to him was a good one. Upon appellee's refusal to take back the dollar or return the ninety-five cents which had been given him in change, the conductor told him that he would have him arrested. The car was proceeding on its way during the controversy between the conductor and appellee, and the conductor, seeing a policeman, called him to the car, told him that appellee had passed a counterfeit dollar on him, gave the dollar to the policeman, and pointed out appellee to him and told him, the policeman, to lock appellee up. The policeman then took appellee by the arm and told him he would have to go with him. Appellee, not resisting, walked with the officer to the police station, where the officer searched him and found ninety-five cents in one of his pockets and sixty-five cents in another. Between eight and nine o'clock P. M. of that evening, appellee was locked up in a cell about twelve feet by fifteen feet in size, and kept there until the next morning, Monday morning, when he was taken before a justice and his bail fixed at \$1,000, in default of giving which, he was ordered to be committed to jail. He was not so committed, however, but was returned to the same cell and kept there until the next Wednesday morning, when he was taken before the justice and discharged. Appellee's diet, when confined as stated, consisted of biscuit and black coffee for breakfast and supper, and the same for dinner with corned beef added. His bed was a wooden plank about fifteen feet long by eight inches wide.

Thus far there is no conflict in the evidence; but there is a conflict in the evidence as to whether the dollar given by



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appellee to the conductor was genuine or counterfeit, and also as to the manner of appellee's discharge. Appellee's account of the manner of his discharge is as follows:

"Q. On Wednesday morning what was done with you? A. They took me up in front of the judge again.

Q. And what was done with you then, after you were before the judge? A. There was some gentleman there examined me.

Q. Well, tell to the jury what they did. A. He examined my hands and asked me where I was working.

Q. After that, what was done with you? A. That very same gentleman went up and spoke to the judge; what he said, I don't know, but there was a police officer there. He told me to go. He never asked me anything at all.

Q. Then, what did you do, Hugo? A. I left; I left the station."

What purports to be a transcript of the proceedings before Justice Severson was put in evidence, certified thus:

"I certify that this transcript contains a full statement of all the proceedings before me in the above entitled case.

OLAF F. SEVERSON, [SEAL.]  
Justice of the Peace."

This document contains, among other things, the following:

"December 9, 1896. Case called for trial. Plaintiff and defendant in court. Plaintiff and defendant sworn and examined. Witnesses sworn and examined. After hearing all the evidence in the said cause, the court enters a *nolle pros.*

Witnesses:

WILLIAM ANDREWS, 1552 Milwaukee Avenue.

OFFICER SINGEON, 32nd Precinct Police Station."

Olaf F. Severson, the justice, called as a witness, testified that the signature to the certificate was his; that the document was taken from the record book, but that the record was not kept by him; that he had no supervision over the person who did keep it, and that he had no knowledge of its accuracy. The witness also testified that the proceedings against appellee occurred before him. This, taken in connection with the fact that he did not keep the

alleged record himself, had no supervision over the person who kept it, and, consequently, had no knowledge of its accuracy, would seem to make his certificate of but little, if any, weight. H. T. Keats, who was clerk for Justice Severson when the proceedings against appellee were had, testified that the record shown him, and from which the document certified by Severson was copied, was the criminal docket kept at the West Chicago Avenue Police Court, and was in his handwriting, and that he took it from the police sheet turned in every morning.

The transcript and the evidence of appellee both show that he was discharged. If there was no proper record kept, then it was clearly competent to prove by oral evidence appellee's discharge. It is a legitimate inference from appellee's discharge that the dollar which he gave to the conductor was genuine, and this, whether he was discharged on a full hearing, as appears by the transcript, or for want of prosecution, as appears from his evidence. The dollar was delivered by Andrews, the conductor, to the officer when the latter arrested appellee. It was the duty of the officer to preserve the dollar and produce it at the hearing, and the legal presumption is he performed this duty. Andrews, the conductor, appeared as a witness, according to the transcript; there had been ample time between December 6th, when the arrest was made, and December 9th, when appellee was taken before the justice for examination, to ascertain beyond peradventure whether the dollar was genuine, and to procure witnesses as to its genuineness or the contrary. If it was produced at the examination, and was counterfeit, it was the duty of the justice (and the legal presumption is that he did his duty) to hold appellee to bail, but he discharged him. On the other hand, if appellee was discharged without examination, as he testifies, it is a legitimate inference that Andrews, the conductor, had ascertained that the dollar was genuine, and therefore declined to prosecute. In this connection it is significant that Andrews, who was a witness for appellant, did not testify that the dollar was counterfeit. His testi-

mony, as abstracted, is as follows: "He gave me a dollar; the dollar did not look right; the lamp in the front end of the car was rather smoky and dim, and the dollar did not feel just right. I gave him his change—ninety-five cents—before I had noticed it much; I told him then, at that time, that I did not think the dollar was 'good.' Again: "I said to him, 'You have given me a bad dollar.'" Nowhere in his evidence did this witness testify that the dollar was, in fact, bad. Andrews testified: "I reported this case to the company at the time. We have our reports to make out during the day." Now, the case having been reported to appellant, and the dollar in question having been turned over to the policeman, and the vital question being whether it was counterfeit or genuine, and a suit for damages, in the event that it was genuine, being, to say the least, not improbable, it would seem that if the dollar was counterfeit, appellant, as a precautionary measure, would have seen to its preservation, so that it might have been produced as evidence in any suit which might be brought against it by appellee. Yet it was not produced, and the last we hear of it is that it was delivered by Andrews to the policeman. Appellee testified that he received the dollar in question from his brother in Hammond, Indiana, the Saturday night before his arrest, and that it was the only dollar in his possession when he gave it to the conductor. The latter statement is corroborated by the policeman, who says that, on searching him, he found only small change on his person. Otto Luleich, appellee's brother, testified that on Saturday night he gave appellee a dollar, and that it was a good silver dollar. Andrews and Singeon, the police officer, were the only witnesses for appellant who were questioned in relation to the genuineness or otherwise of the dollar, and the latter testified that he found it was soft and thought it was lead.

There was no direct or positive evidence that the coin was counterfeit.

Appellee was arrested without a warrant, and without complaint having been made other than the verbal state-

ment made by Andrews to police officer Singeon. Maher, clerk of the Police Court at the station where appellee was confined, and where he was brought up for examination, testified that he had searched all the files and records where such papers were kept, and had been unable to find any complaint against appellee. The transcript contains this recital: "Defendant arrested while committing crime of violating Section 112, Chapter 38 of the Revised Statutes of Illinois, by police officer Ed. Singeon. Written complaint filed by William Andrews."

Section 112 is as follows:

"Every person who shall have in his possession, or receive for any other person, any counterfeit gold or silver coin or coins of the species current by law or usage in this State, with intention to utter or pass the same, or to permit, cause or procure the same to be uttered or passed, with intention to defraud any person or body politic or corporate, knowing the same to be counterfeit, shall be imprisoned in the penitentiary not less than one nor more than fourteen years."

The court instructed the jury, in substance, that if there was probable cause for the arrest of appellee, they should find appellant not guilty. If the dollar was counterfeit, then certainly there was probable cause for the arrest. The jury, by their verdict of guilty, found that there was not probable cause for the arrest, which finding necessarily included the finding, not only that the coin was genuine, but that there was no reasonable ground of suspicion that it was counterfeit. We are of opinion that this finding is warranted by the evidence. If the coin was genuine, then appellee paid his fare and was a passenger and entitled to protection as such.

The chief contention of appellant's counsel is, that the causing the arrest was outside the scope of the conductor's duty, and he argues that authority to cause the arrest can not be implied. We think appellant's counsel misconceives the sense in which the words *within the scope of his authority* are used in his text books and judicial opinions. It is not essential to the liability of the master, as counsel

assumes, that the servant should be authorized, either expressly or by implication, to do the very act for which the master is sought to be made liable. Take a familiar instance: A, the owner of a wagon, employs B to drive the wagon in A's business. B, while so doing, drives recklessly or carelessly, by reason whereof the wagon collides with another vehicle, injuring it and some of its occupants. A is liable, not because he authorized B to drive recklessly or carelessly, which he did not, but because B was acting within the general scope of his authority, which was to drive the wagon in his employer's business. Having authorized B to drive the wagon, he is as responsible for his negligent driving as if he himself had been driving and guilty of the negligence which caused the accident. In legal contemplation, he acted by B.

Appellant, as a common carrier of passengers, has power to expel from its trains persons who are disorderly to the inconvenience and annoyance of other passengers, they refusing to desist from such disorderly conduct, and persons who refuse to pay their fare. Booth on Street Railways, Sec. 369; C., B. & Q. R. R. Co. v. Griffin, 68 Ill. 499; Chicago City Ry. Co. v. Pelletier, 134 Ib. 120.

Appellant, being a corporation, can only exercise this power by an agent, who is usually, if not uniformly, its conductor. It therefore authorizes the conductor to exercise the power. Necessarily the conductor, in exercising the power, must act in accordance with his own judgment. If he removes a passenger from the car wrongfully, or in an unlawful manner, appellant is responsible, because the conductor, in so removing the person, is acting within the general scope of his authority, which is to exercise the power of removal. In legal contemplation, the corporation is present and acting in the person of its conductor. We are not left, however, to decide the question as if it were wholly unadjudicated, and, therefore, of first impression. The views here expressed are sanctioned by numerous authorities, among which are the following; Booth on Street Railways, Sec. 373; Morawetz on Priv. Corp., 2d Ed., Sec.

726; Newell on Malicious Prosecution, Sec. 102; Hoffman v. N. Y. Cen. R. R. Co., 87 N. Y. 25; Lynch v. Met. El. Ry. Co., 90 Ib. 77; Palmeri v. Manhattan Ry. Co., 133 Ib. 261; Krulevitz v. Eastern R. R. Co., 143 Mass. 228; A. T. & S. F. R. R. Co. v. Henry, 55 Kan. 715.

The last four cases cited *supra*, are cases of false arrest by servants of the corporations named, and are analogous to the case at bar.

In C. & E. R. R. Co. v. Flexman, 103 Ill. 546, it appeared that Flexman, while a passenger on the railroad company's train, lost his watch. A fellow passenger asked him who he thought had his watch, in response to which question Flexman pointed to the brakeman, saying, "that fellow," whereupon the brakeman struck him in the face with a railroad lantern. The court held the railroad company liable, saying, among other things, "The contract which existed between appellant, as a common carrier, and appellee, as a passenger, was a guaranty on behalf of the carrier that appellee should be protected against personal injury from the agents or servants of appellant in charge of the train." The doctrine thus announced is well sustained by the authorities.

Appellant's counsel now makes the specific objection that the evidence as to the manner in which appellee was fed, while imprisoned, was erroneously admitted, for the reason that it is not alleged in the declaration that he was improperly or insufficiently fed. Had this specific objection been made in the trial court, appellee might have amended his declaration or withdrawn the evidence; it was not, but only a general objection, which was insufficient; and the specific objection comes too late. *Espen v. Hinchliffe*, 131 Ill. 468.

No other objection relating to evidence is relied on in the argument of appellant's counsel. The only objection made by counsel to the instructions of the court, is to the following language in appellee's first instruction:

"Such arrest can only be justified by the defendant in the suit by proving the actual guilt of the plaintiff, or that the conductor had probable cause for such arrest."

The objection made is that the language quoted "took from the jury all consideration of the main point of the defense, that the conductor, in causing the arrest, was acting as a private individual, and not as an agent or servant of the company." We think the objection untenable. It was proved that Andrews was the conductor; as such he was exercising the power of appellant in removing appellee from the car; in his private capacity, as an individual, he could not have exercised that power, and there is nothing in the evidence which would have warranted the court in submitting to the jury the question as to whether the conductor was acting in his private capacity, as an individual. In causing appellee's removal from the car, he was acting in his capacity as conductor, and in the exercise of his power as such, and appellant, by whose authority he exercised the power, is liable for the consequences of the unlawful manner in which it was exercised.

The objection that the damages are excessive, can not be sustained. The trial was, so far as appears from the record, fair and impartial, and the amount awarded as damages is not such as to warrant the inference that the jury was influenced by passion, prejudice or partiality.

The judgment will be affirmed.

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**Anthony J. Fisher and Samuel Dietcher v. A. Y. McDonald Co.**

1. INSTRUCTIONS—*As to the Liability of a Partner.*—It is error to base the question of the liability of a person as a partner upon what a reasonable and prudent man may have cause to believe. The question is whether a party, from the facts and circumstances which had come to his knowledge, or which, in the exercise of proper care he would have known, had a right to and did believe that such party was a member of the firm.

2. PRACTICE—*Effect of Attaching an Affidavit to the Declaration.*—Where an affidavit is attached to the declaration and no affidavit of merits is filed by the defendant, the affidavit attached to the declaration is *prima facie* evidence of the amount due and no further testimony is necessary.

Error to the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed December 5, 1899.

STEPHEN G. SWISHER, attorney for Samuel Dietcher, one of the plaintiffs in error.

E. S. CUMMINGS, attorney for plaintiff in error Anthony J. Fisher.

As between the parties the question of the existence of a partnership relation is one of intention, to be gathered from all the circumstances. *National Surety Co. v. T. B. Townsend B. & C. Co.*, 176 Ill. 156.

Liability as partners to third persons. See Vol. 1, *Lindley on Partnerships* (Wentworth's Notes), Sec. 43, page 55; *Thompson v. First National Bank*, 111 U. S. 529; *Bowen v. Rutherford*, 60 Ill. 41.

To estop a person to deny that he is a partner, the act of holding out must be voluntary on his part; merely being held out as a partner by another without knowledge of it creates no liability. No estoppel arises if he is not in fault. The holding out must be by his own knowledge, assent or acts. *Bates on Partnerships*, Sec. 95; *Smith v. Newton*, 38 Ill. 230; *People v. Brown*, 67 Ill. 435; *Story on Partnership* (7th Ed.), Sec. 54, page 86.

BULKLEY, GRAY & MORE, attorneys for defendant in error.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This suit was commenced against Henry L. Dietcher and Anthony J. Fisher. Afterward, by order of court, S. Dietcher was made a party defendant. When the case was called for trial, and on motion of plaintiff's attorneys, the suit was discontinued as to the defendant Henry L. Dietcher; verdict and judgment are against said Fisher and S. Dietcher. To reverse said judgment this cause is brought to this court.



For several years prior to the spring of 1892 Samuel Dietcher had been in mercantile business at Jefferson Park in this county. In April, 1892, being in ill health, he gave the business to his son, said Henry L. Dietcher. Said Fisher and said Henry L. continued the business as partners under the firm name of Dietcher & Fisher. It is contended, and judgment was apparently entered against said Samuel upon the theory that, under the facts and circumstances, he should be held liable to pay for goods purchased in the continuance of said business, whatever may have been the relation of the parties defendant as between themselves.

The testimony is clear and uncontradicted that said Fisher and said Henry L. Dietcher were the only members of said firm of Dietcher & Fisher. Said Samuel Dietcher was never, in fact, a member of that firm. As said judgment must be reversed and this cause remanded for another trial, we do not feel called upon to express any opinion upon the testimony as to the continuing liability of said Samuel Dietcher to creditors.

Those who were in fact members of said firm of Dietcher & Fisher are undoubtedly liable for the debts of said firm. And if said Samuel Dietcher is compelled to pay such debts, then the members of said firm must repay to him the amount he is thus required to pay. If said Samuel is liable jointly with any one for such debts, it is with both of the members of said firm. He was not, in fact, a partner of said Fisher. There was no joint contract by said Samuel and said Fisher creating a joint liability. It was error to dismiss this suit as to said Henry L. and to enter a judgment against said Samuel and said Fisher jointly.

The court gave to the jury the following instruction, viz.:

“The court instructs the jury that parties may so conduct themselves as to be liable to third persons as partners when in fact no partnership exists between themselves. The public are authorized to judge from appearances and are not bound to know the real facts. Persons may be co-partners as to third persons and brought within all the liabilities of partners as to third persons, who are not partners between themselves, and they will be so regarded as to

third persons if the evidence shows they voluntarily and intentionally so conducted themselves as to reasonably justify the public or persons dealing with them in believing that they are partners. *And if you further find that the plaintiffs did so deal with the defendants, and that from all the facts shown in evidence you find that a reasonable and prudent man had cause to believe said defendants were in fact partners, you may find for the plaintiffs.*

It appears from the argument of the attorneys for defendant in error, but not by the abstract of record, that the last sentence (in italics) was added by the court.

The attorney for plaintiff in error Samuel Dietcher contends that it was error to give said instruction. He cites no authorities, however, in support of his contention. Neither do the attorneys for defendant in error cite any authorities to sustain the correctness of said instruction, and they say "we believe the instruction without the modification was more accurate than with it."

It is a mistake to base the question of the liability of plaintiff in error upon what a reasonable and prudent man "may have had cause to believe." The question is whether defendant in error, from the facts and circumstances which had come to its knowledge, or which in the exercise of proper care it would have known, had a right to and did believe that plaintiff in error was a member of the firm to which credit was extended.

Said instruction should not have been given.

Plaintiff in error Fisher was not present or represented by attorney at the trial of said cause. By the other parties who were present, in person or by attorney, the amount due from Dietcher & Fisher to defendant in error was agreed upon. There was no testimony as to the amount thus due. Attorneys for said Fisher here contend that he is not bound by such agreement, and that it was error to enter judgment without proof as to the amount.

There is attached to the declaration an affidavit stating the amount due to be the same as the amount of the judgment. There was no affidavit of merits filed by said Fisher. The affidavit attached to the declaration is therefore *prima*

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*facie* evidence of the amount due. Under the pleadings and record no further testimony was necessary. Stat., Ch. 110, Secs. 37 and 38.

For the errors indicated the judgment of the Superior Court is reversed and the cause remanded.

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### Dena Reiten v. Lake St. Elevated R. R. Co.

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107	8

1. PASSENGER AND CARRIER—*Where the Relation Does Not Exist.*—Where there is no evidence that the plaintiff had paid her fare or had a ticket, but only that she presented herself on the station platform and attempted to get upon defendant's train, the relation of passenger and carrier is not shown to exist.

2. PRACTICE—*Refusal of Court to Allow Proof of Res Gestae.*—The refusal of the court to allow the plaintiff to prove what the conductor said in response to the statement of a witness, at the moment the accident occurred by which she was injured, was erroneous. It was part of the *res gestae* and was competent.

**Action in Case, for personal injuries.** Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Mr. Justice ADAMS dissenting. Opinion filed November 27, 1899.

**Statement by the Court.**—Appellant, on July 29, 1896, was very seriously injured in her back and had both ankles broken by falling while attempting to board one of appellee's trains at Sheldon street station, Chicago, the train being operated on an elevated railroad. She fell from the platform of the station to the ground below. She brought suit to recover for her injuries, and alleged in her declaration, consisting of three counts, in each, that she paid her fare and presented herself as a passenger on a train of appellee which had just arrived at the station. In the first count the negligence stated was, in substance, that the servants of appellee caused the train to be suddenly and violently started and moved, and did not stop the train a sufficient length of time to enable her to board the same; in the sec-

ond count, that upon the arrival of the train at the station, and after it had stopped, and while she was attempting to board the same, appellee's servants carelessly and negligently caused the train to be started and moved without having delayed a sufficient length of time for her to get on board, although she was waiting at the station before the arrival of the train and used all due haste to board the same on its arrival, and that by starting said train before she was enabled to board it she lost her foothold and fell to the street below; and in the third count, that after stopping the train at the station it was started up before she was able to board the same, and before closing the gates to the train, although she was at the station before the train arrived, and used customary and ordinary diligence in attempting to board the same on its arrival.

The plea was not guilty, and the hearing before the court and a jury resulted in a verdict for the appellee, which was directed by the court at the close of appellant's evidence. A judgment was entered upon this verdict, from which this appeal is taken.

Appellant testified that she waited on the platform of the station about five minutes for the train to come; that it came slowly; was coming to a stop; that she ran beside the middle car; saw a man running in the same direction and getting on the middle car; that he got on in front of her, and she could have touched him with her hand; that the gate was wide open; that the car stopped and as she was getting on she had her hand on the handle-bar; that she couldn't say for sure that the car was exactly standing still, it might have been "the least little moving," but as she put her foot on the platform of the car it just started out; that when she was getting on, it was about eight or ten feet from the east end of the platform of the station; that she felt the car going; that it started as if it had started up; that she couldn't say the car might have been a little in motion when she got her foot on, and when she got her foot on, the car went right on; also that the conductor was standing by the gates.

On cross-examination she testified that she started to run along the middle when it, the car, was running very slowly; that she did not start to get on the car before it stopped.

In response to questions by the court she said that when she took hold of the rail of the car she was running; that she ran all the time; was running the same way the car was; that as quick as she got in reach of the rail she grabbed it with her left hand and at the same time put her left foot on the platform, and that the car started quick as she put her right foot on the car, and the only thing she knew after that she felt her right foot go down and she went down to the street; also that the car came to a stop before she was getting on.

She also further testified, on cross-examination, that when she stepped on the car that if it had started it "might have been moving just very slowly;" also, that the car started quick as she put her right foot on the car, and the only thing after that she knew was that she felt her right foot go down.

Arthur English, a witness for appellant, testified that he got on the second car of the train; that the train pulled up pretty far toward the east end of the platform; he put his foot on the platform, and "the conductor rung and signaled with the bell cord for them to go ahead. At that time I had only one foot on the car; the other foot was on the platform. I was the first one to get on the car; immediately after me came this lady. As I was stepping from the platform to the car, toward the rear platform of the rear end of the smoking car, this lady followed me; she followed me from the bench where she sat. I got on the car and he gave the signal to go ahead when I had one foot on the car; the lady was right behind me. The gates were open at that time. The train started with a jerk; the next I saw of her she was holding on that rail with one hand and running along the platform. I should say it was eight or ten feet from the platform to the place where she attempted to get on the platform. Of course when I was boarding the train I could not see backward. I saw her fall."

He also testified that the gates were not shut at the time; that the conductor shut them when she fell; that they were about eight inches ajar when she fell, and that after she fell the conductor shut the gates.

On cross-examination this witness testified that he did not see the gates open; that he started to board the train before it came to a standstill; that the car was moving when he got on, and was "moving slow;" that he started to get on before the car stopped; that he walked as he went to get on the car; that as he first went onto the platform of the car it was in motion; that it did not stop. "I stepped on before it stopped. It stopped after I stepped on. \* \* After the conductor gave the signal to stop, that was when the lady fell to the ground; that was when the car came to a stop. The car never did stop until the lady fell. It slackened up—went slower than you would walk." The witness declined to state the speed of the train, but when asked by the court to give his best judgment, answered, "Pretty near to a stop. I am no judge of how many miles an hour it was going—just about half as fast as I can walk." He further testified that the conductor was standing midway between the cars at the time witness got on; that the conductor had one hand on the lever of the second car gate; that conductor rang the bell, and when the bell rang witness had one foot on the car and the other on the platform of the station.

This witness, on direct examination, was asked what he said to the conductor at the time he saw appellant fall. The question was objected to, the objection sustained and an exception preserved.

On cross-examination he was asked what he did at the time with reference to the accident, to which he replied :

"A. Do you mean after the train stopped ?

The Court: What did you do when you saw the girl ahold of the car there and her foot on it; did you go to the girl's assistance ?

A. I told the conductor, 'There she is, and, there, she is going down.' I did not go after the girl."

On re-direct examination the following occurred :

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“Q. (by appellant’s counsel): When you told the conductor that she had gone down, what did he say?

(The court raised an objection to this question, and said it was improper for him to answer.)

Mr. Jones: Are we at liberty to say to the court what we expect to prove by this witness?

The Court: No.

(Exception by plaintiff.)”

N. M. JONES, attorney for appellant; JONES & LUSK, of counsel.

CLARENCE KNIGHT and WILLIAM G. ADAMS, attorneys for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

It is claimed on behalf of appellant that the relation of passenger and carrier existed between appellant and appellee, but the evidence fails to support this contention. There is no evidence that appellant had paid her fare or had a ticket, but only that she presented herself on the station platform and attempted to get upon appellee’s train. We are not prepared to hold that such fact showed the relation of passenger to appellee, and therefore the authorities cited in that behalf and argument made are not applicable.

It is also claimed that, upon the evidence before the court, the court erred in refusing to submit the case to the jury. Whether or not this position is tenable, it seems unnecessary for us, on this record, to decide.

For appellee it is contended that appellant was guilty of contributory negligence because she attempted to get on the train while it was moving, and for that reason there was no error in taking the case from the jury. This question it is also unnecessary to decide on this record.

We are of opinion that the ruling of the court in refusing to allow appellant to prove what the conductor said in response to the statement of the witness English, at the moment the accident occurred, as follows, “There she is, and there she is going down,” was erroneous. It was part of the *res gestæ*, and was competent. O. & M. R. R. Co. v

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Porter, 92 Ill. 439; Springfield v. Welsch, 155 Ill. 511; Quincy v. Gunse, 137 Ill. 264; Springfield Ry. Co. v. Hoeffner, 175 Ill. 634-43, and cases there cited.

We are unable, by reason of the court's refusal to allow appellant's counsel to state what he expected to prove by the witness, to tell what the evidence was, but we may assume that it would show facts tending to prove appellant's right to recover. It is no justification of the court's ruling that the evidence was excluded on re-direct. Appellant attempted to put it in on her direct case, but the court ruled it out. A part of the evidence, being the words of the witness to the conductor at the instant of the accident, having been brought out on cross-examination, appellant was entitled to show what the conductor said in reply. 1 Wharton on Evid., Secs. 572 and 573; Marsullo v. Met. St. Ry. Co., 52 N. Y. Sup. 286; Dutcher v. Howard, 47 Pac. Rep. 28.

For the error in excluding this evidence, the judgment is reversed and the cause remanded.

MR. JUSTICE ADAMS dissenting.

I am of the opinion that the judgment should be affirmed.

85	662
298	1812
85	662
196	45

**Ascher Pitzele and Nathan Pitzele, Interpleaders, v. Clifford L. Lutkins.**

1. **PRACTICE—Setting Aside Defaults.**—A motion to set aside a default is addressed to the sound legal discretion of the court in which it is made, and unless there has been a palpable abuse of such discretion the Appellate Court will not interfere.

2. **SAME—Where Defaults Will be Set Aside.**—It is only where it is evident that the action of the court below has been unjust and oppressive, and has resulted in a substantial injury to the appellant, that it will be reversed on review.

3. **DEFAULTS—Object to be Obtained in Setting Aside.**—The object to be obtained in considering an application to vacate a default judgment is justice—not justice in the abstract, but justice between the parties in the particular case, in view of all the circumstances.

4. **SAME—Diligence to be Exercised.**—Where a defaulted party has



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failed to exercise proper diligence, the default will not be set aside, although he has a good defense upon the merits.

5. *SAME—Lack of Diligence of Attorneys.*—The negligence, or lack of diligence, by a party's attorney, or of both himself and his attorney, will not avail him.

6. *SAME—What Should Appear in Motions to Set Aside.*—To invoke the exercise of this power of the court, three things must be made to appear, viz.: That the defaulted defendant has a meritorious defense to the plaintiff's claim in whole or in part; that neither he nor his attorney were neglectful of their rights and duties in the particular case; and that some "substantial injury" to him has resulted.

7. *SAME—Construction of Affidavits on Motions.*—In applications to set aside judgments entered by default or entered in *ex parte* proceedings, affidavits in support of such applications are to be construed most strongly against the party making them. It is not sufficient to state facts from which, if proved on a trial, a defense might be inferred.

**Attachment and Interpleader.**—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1899. Affirmed. Mr. Justice FREEMAN dissenting. Opinion filed December 5, 1899.

CARPENTER BROS., attorneys for appellants.

J. S. HUEY, attorney for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

Appellee began his suit in attachment in the court below against one Nathan, of New York, and attached certain goods and garnisheed certain credits as the property and credits of said Nathan. No defense to the suit was made by Nathan.

The appellants interpleaded in the suit and claimed the attached goods as their own by purchase, and the credits garnisheed as theirs by assignment.

Issue was joined on the interplea, and the cause was placed on the trial call of the Superior Court for Tuesday, April 12, 1898, and remained on the call continuously thereafter until it was reached for trial on the afternoon of Thursday, April 14th. At about half after one o'clock of said Thursday, the court called four cases that stood upon the trial call, to see if parties were ready for trial, with the result

that it was announced the first one had been settled, and that the next three, of which this case was the last one, were ready for trial, the appellants being present and responding by their counsel.

Shortly afterward appellants' counsel left the court room, and during his absence the case was called, and the interplea was dismissed for want of prosecution at appellants' cost.

Four days afterward, the appellants moved the court to set aside the order dismissing the interplea and said judgment for costs, upon affidavits then read to the court and filed, but the court overruled the motion and this appeal has followed.

The sole question to be considered is, was there such a palpable abuse of discretion by the trial court in refusing to set aside said order as will justify us in interfering?

"It is the settled and long-established rule in this State that a motion to set aside a default is addressed to the sound legal discretion of the court in which it is made, and that unless there has been a palpable abuse of said discretion the Appellate Courts will not interfere.

It is only where it is evident the action of the court below has been unjust and oppressive, and has resulted in a substantial injury to the appellant, that such action will be reversed on review." *Hitchcock v. Herzer*, 90 Ill. 543.

The object to be attained in considering an application to vacate a default judgment is justice—not justice in the abstract, but justice between the parties in the particular case, in view of all the circumstances. *Mason v. McNamara*, 57 Ill. 274.

So, it has been held that though the defaulted party has a good defense upon the merits, but he has failed to exercise proper diligence, the default will not be set aside. *Mendell v. Kimball*, 85 Ill. 582.

Nor will the negligence, or lack of diligence, by his attorney, or of both himself and his attorney, avail him. *Mendell v. Kimball*, *supra*; *Treutler v. Halligan*, 86 Ill. 39; *Schultz v. Meiselbar*, 144 Ill. 26.

We do not doubt the power of this court, or the propriety

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of its exercise upon a proper showing, to review and reverse the judgment of the court below for an abuse of its discretion in refusing to vacate a judgment by default upon application therefor made in the term at which the judgment is entered. The cases where the power has been exercised are too numerous and too familiar to require citation.

But to invoke the exercise of the power, three things must be made to appear to the court below, viz.: that the defaulted defendant has a meritorious defense to the plaintiff's claim in whole or in part; that neither he nor his attorney were neglectful of their rights and duties in the particular case, and that some "substantial injury" to him has resulted, before this court may properly say the court before whom the application was made, erred in refusing to set aside the judgment.

If it be granted, as it may be on the face of the affidavit by one of the appellants, that appellants had a *prima facie* defense to a part, at least, of appellee's suit, we do not think his diligence in asserting such defense was sufficient for us to say there was error.

The case had been upon the trial call for three days. A test call was then made of the undisposed cases for the day, with the view of making an announcement for the convenience of the members of the bar in attendance. The result showed that but two cases ahead of this one remained to be disposed of. Appellant's attorney was present at that call and responded to it that he was ready.

Making inquiry, the attorney was told by the attorney in one of the cases that was ahead of this one that that case would require fifteen minutes of time. Thereupon the attorney left the court room and went out to do some telephoning, without leaving word with the court, or anybody except his adversary, of his purpose. At that time one of the appellants was in an adjacent court room, "within call all of said afternoon, and was ready" for the case; but, so far as appears, the attorney left no word with him of his intention to go away, or to watch the case.

Although the attorney returned in a comparatively sho-

time, he was absent long enough for the two cases that had precedence of the one at bar to be disposed of and this one heard. And it was not until four days after the judgment was entered that any motion was made to set it aside. The Superior Court was not satisfied with the showing of diligence that was made, nor are we to such an extent as would warrant us in saying that there was error in the discretion reposed in that court.

Furthermore, no material injury to appellants is shown, except, perhaps, by way of inference, and inference is not enough to rest applications of this kind upon.

"In applications to set aside judgments entered by default, or entered in *ex parte* proceedings, affidavits in support of such applications are to be construed most strongly against the party making them. It is not sufficient to state facts from which, if proved on a trial, a defense might be inferred." *Crossman v. Wohlleben*, 90 Ill. 537.

The most that is made to appear in respect of a resulting injury to appellants, because of the court's refusal to set aside the judgment, is that appellants' claim to the property attached is based upon an executory agreement by appellants with Nathan to credit the value of the property upon a note of Nathan held by appellants; but the value of the property is not stated, nor the alleged purchase price of it, and, *non constat*, the note is as good as it ever was against Scheyer.

To hold that such error was committed by the trial judge as to require a reversal of this judgment, would be to put a premium upon the conduct of such defendants and their attorneys as might in future suits get their cases ready for trial and, at the hour of their being called, withdraw from the court rooms and leave judgment to go against them by default, and then, some days later, come in and ask for a setting aside of the judgment upon *ex parte* affidavits, showing a meritorious defense and nothing more, and thereby gain delay.

We observe no sufficient ground for disturbing the judgment of the Superior Court, and it will be affirmed.

MR. JUSTICE FREEMAN, dissenting.

I can not concur in this decision. The only question presented is, whether there was an abuse of sound legal discretion in the refusal of the Superior Court to set aside an order and judgment entered in favor of appellee upon the regular call of the trial calendar.

It appears that the cause had been upon the calendar, and liable to be reached for trial at any time for three successive days. When finally called, appellants' attorneys were not present, and no one appeared to represent them or their clients. The interpleas of appellants were thereupon dismissed for want of prosecution, and judgment for costs entered accordingly.

Four days thereafter appellants moved to set aside the judgment, to reinstate the interpleas and for a trial upon the merits. No denial is made that the facts set up in the affidavits filed in support of this motion, tend to show a meritorious cause of action, and, as they are therein stated, a sufficiently meritorious cause of action appears.

In *Waugh v. Suter*, 3 Ill. App. 274, it is said :

"In applications to set aside a default, we regard the point of a meritorious defense as altogether the more important of the two required, and where the judgment is unjust a certain degree of neglect may, especially as terms can be imposed, be held to be excusable."

In *Dunlap v. Gregory*, 14 Ill. App. 601-606, the court, after an examination of preceding cases, thus states the rule :

"When a judgment which is plainly unjust has been rendered against a party by default, if a reasonable excuse is shown for not having made a defense, and the party against whom the judgment is rendered, exercises reasonable and ordinary diligence in moving to set it aside, it is the duty of the court to exercise its discretion by granting the motion, especially if it be made at the same term at which the judgment is rendered. The discretion vested in the courts to grant or deny motions of this character is not an absolute, but a legal discretion, which is subject to be reviewed."

A similar view is expressed in other cases. *Slack v. Casey*, 22 Ill. App. 412; *Allen v. Hoffman*, 12 Ill. App. 573; *Mason v. McNamara*, 57 Ill. 274. In the last mentioned case it is said :

"As we understand the long and well settled practice in this State, it has always been liberal in setting aside defaults at the term at which they were entered, where it appeared that justice will be promoted thereby."

In *Hitchcock v. Herzer*, 90 Ill. 543, the discretion exercised by the trial court in refusing to set aside a default was sustained, the affidavit by which it was sought to show a meritorious defense being made upon information and belief only, without stating facts upon which such belief could be founded. In *Bowman v. Wood*, 41 Ill. 203, a like refusal was sustained, and it was held the trial court was not called upon in that case to set aside the default "as it might have been if the set-off would have been lost or could not have been otherwise recovered." In *Andrews v. Campbell*, 94 Ill. 577, it was held the application to set aside a default might not improperly have been allowed, but the motion having been so long delayed the exercise of discretion by the trial court would not be disturbed. In *Union Hide & Leather Co. v. Woodley*, 75 Ill. 435, the defendants, who sought to have the default set aside, were held guilty of gross negligence amply justifying a refusal of the motion.

It appears from the affidavit filed by appellants' counsel in support of the motion to set aside in the case at bar, that on the day judgment was entered, the attorney for appellee was present in court; that about 1:30 P. M. the judge called four cases to ascertain if they were ready for trial, and it was found that three, of which the case before us was the last, were so ready, and it was announced that none others would be called that day. Appellants' lawyer then inquired of an attorney whose case preceded his own upon the call how long such attorney's case would take, and was told it would require about fifteen minutes. Affiant states the attorney of appellee had requested him to have the declaration, which was apparently in appellants' possession, returned, and affiant was induced by that request to leave the court room in order to telephone to his partner to bring the declaration into court; he says he told appellee's attorney that he would be gone for that purpose about ten or fifteen min-

utes, to which appellee's attorney responded "All right," or words to that effect. Affiant states that he returned in less than fifteen minutes, met appellee's counsel in the hallway, and was informed that the latter had taken judgment in his absence. He states also that one of the appellants was in an adjacent court room helping to watch another case, within call, and ready for the trial of the case now before us. Appellee's attorney denies by affidavit that he was told appellants' attorney would be gone ten or fifteen minutes, that he responded "All right," or words to that effect, and denied that he requested to have the declaration in court. He insists he did and said nothing to give any intimation that he would endeavor to hold the case if reached before the return of appellants' counsel. He states, however, that appellants' attorney said to him that he did not believe said case would be reached that day, and "made some remark to the effect that he was going down to telephone to his brother at South Chicago." Other matters are set out in the affidavits, but I do not regard them as material with reference to the explanations offered to excuse the absence of appellants' attorney when the cause was reached for hearing. It does not appear that he at once called the court's attention to his return and asked for a hearing; nor does it appear whether he could or could not have done so; or whether the court, having thus disposed of the last case on the call for the day, had or had not already adjourned. The motion to set aside was made, with accompanying affidavits, four days thereafter.

The case of Slack v. Casey (above referred to) was in some respects similar to that under consideration. There the appellant's attorney having learned that another case would be taken up for trial preceding his own, went to an adjoining court room to see about other cases, and returning in a few minutes found to his surprise that his case had been called and disposed of. The affidavits showed a meritorious defense, and it was held in order that justice should be done, it was necessary that the judgment should be set aside and the defendant permitted to make his defense. In

reversing the judgment because of the denial by the trial court of a motion to set aside, the Appellate Court says :

"It clearly appears in this case that appellant had prepared for the trial of his case, and made such arrangements as under the ordinary course of business in the court would have enabled him to be present to offer his defense. His attorney might, it is true, have exercised such a degree of diligence that the case could not have been called without his knowledge, but where the client has been diligent, he ought not to be mulcted by reason of the fact that his attorney has miscalculated the progress of the court's business to the extent of twenty minutes, particularly when it appears that he was caught wrong, because two cases standing before his in the call, were passed for a few minutes, and his case thus reached and done for, before, in the order of events, \* \* \* there was reason for expecting that its time had come."

It appears from his own affidavit that the attorney for appellee was told that appellants' counsel had gone out to send a telephone message, and it could not well be doubted that he was expecting to return. The highest ethics of the profession would seem to require that under these circumstances the court should be so advised. Whether this was done or not does not appear, but the writer is of opinion that the appellee should not be allowed to profit by an advantage thus secured. The primary object of courts is to do justice between litigants, and while diligence is entitled to its legitimate reward, a slight remissness in this respect is visited with too severe a punishment if it gives judgment to one not entitled. A sufficient penalty can be imposed ordinarily in other ways.

The writer is of opinion that, under the circumstances, the motion to set aside should have been granted upon such reasonable terms as the trial court might have found it proper to impose. There being no dispute that the affidavits in support of the motion show a meritorious cause, the appellant ought not to be deprived of a hearing solely because of a miscalculation or mistake in judgment of his attorney.

Appellants would have made out a stronger case, doubt-



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less, had they stated affirmatively in their affidavits that they are, by the action of the trial court, barred from obtaining in any other way the payment of which the judgment in question appears to deprive them. The writer is of the opinion, however, that from the facts as stated it sufficiently appears.

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**Louisa B. Stephens v. Phoenix Assurance Co.**

1. **INSURANCE—Premises Becoming Vacant.**—Where a policy provides that if the building insured becomes vacant and unoccupied, and so remains for a period of ten days, the policy shall become void, the company is not necessarily rendered liable for a loss occurring while the vacancy continued to exist, because, knowing the fact, it had not meanwhile forfeited the policy.

2. **SAME—Limitation by Agreement in the Policy.**—A provision that no suit on the policy for the recovery of any claim shall be sustainable unless commenced within twelve months next after the fire, is a valid and binding agreement between the parties.

**Assumpsit**, on a policy of fire insurance. Trial in the Circuit Court of Cook County; the Hon. CHARLES A. BISHOP, Judge, presiding. Verdict and judgment for defendant; appeal by plaintiffs. Heard in the Branch Appellate Court at the October term, 1899. Affirmed. Opinion filed December 5, 1899.

This is a suit by appellant to recover under two policies of insurance issued by appellee.

Appellant had caused two houses to be erected, which were completed under charge of an agent while she was abroad. Prior to her departure, the policies in question were issued through said agent, who was also agent of appellee. It is said that these policies were delivered directly to appellant when issued, but upon her departure were sent by her to her agent in charge of the buildings, and they remained in his possession during her absence and after her return until the buildings insured were destroyed by fire. The policies were then, on the day of the fire, returned to appellant by the brother of her said agent, who told her

the houses had been burned, and apparently also informed her that no vacancy permit had been given. She had returned from Europe in September, and the fire occurred October 18, 1894.

It appears that the houses had been completed in May or about that time, and remained vacant and unoccupied until the fire. Each of the policies contained the following provision :

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void \* \* \* if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant and unoccupied, and so remain for ten days."

The day following the fire appellant wrote to the said agent a letter in which she expressed her mortification at her "own carelessness, because I have not attended to that property myself," and expressed her surprise, that he—said agent—"an insurance man, should allow those houses to stand vacant all this time, without a vacancy permit on them." She says, "I know well there is no use to try to get any insurance on them, as you see by lines 25 to 30 of the specifications," referring to the provision of the policies above quoted relating to vacancy. The letter then continues as follows :

"As you are the agent for this insurance company, if there could be anything reclaimed on this you surely could do it. I have no hope. Yet if there could be anything done, do let me know at once what I could do."

In response to this letter the agent called upon appellant the same evening. She says that he told her she could not get the insurance, that it had failed over and over in the courts, but that if she would give him the policies he would get her a rebate from the company of the premium. Appellant finally agreed to this, and thereupon the agent wrote a release and surrender upon the back of each policy, which appellant signed. This was to the effect that in consideration of \$30.60, appellant releases and waives all her right, title and interest in said policies, respectively, and surrenders and delivers "same to the Phoenix Assurance Com-

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pany of London, by Ernest N. Smith & Co., their agents." Beneath this upon each policy is an authorization to said "Ernest N. Smith & Co., as my agents" to receive from appellee said \$30.60 "as payment in full for my interest in the within policy," which is also signed by appellee.

There also appears on each policy a statement, in writing, that in consideration of said \$30.60 return premium "this policy is hereby canceled and surrendered to the company," which is signed "Louisa B. Stephens, assured, by Ernest H. Smith & Co., her agents."

Appellant testified that Smith brought her the money the next day, which she accepted.

December 17th following, almost two months after the surrender of the policies as above stated, proofs of loss were delivered to the appellee, and at the same time the \$61.20 which appellant had received from Smith was tendered back to the company, and the policies demanded, which demand was refused. Nothing more appears to have been done until the present suit was begun August 27, 1896, more than a year and ten months after the fire.

The policies in controversy contain the following provision:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, or unless commenced within twelve months next after the fire."

At the trial the court instructed the jury at the close of the plaintiff's case to find for the defendant, which was done.

ROBERT RAE, attorney for appellant.

BATES & HARDING, attorneys for appellee.

MR. JUSTICE FREEMAN, after making the foregoing statement, delivered the opinion of the court.

Counsel for appellant state in their brief that appellant did not, in her declaration, count upon the policies, which

had before been surrendered to and were in the possession of appellee, but upon the insurance generally. The declaration alleged that the policies were "not surrendered by said plaintiff or canceled; but that the possession thereof was obtained by said defendant by the fraudulent representations made by said defendant and its agents and servants, and therefore plaintiff is unable to produce said policies." It is charged that appellee's agent, who was also agent for appellant, in the construction and care of her buildings which were burned, "fraudulently and deceitfully represented to said plaintiff that she, the said plaintiff, had no claim against said defendant by reason of said loss by fire."

It is claimed that this being an action for fraud, the cause of action is thereby taken out of the provision in the policies limiting the time within which the action can be brought.

The fraud which it is said was perpetrated by the appellee's agent is, that "he did not disclose the fact that if the agent retained the premium and continued the policy with a knowledge of non-occupancy the condition was waived."

The language of the policies in this respect is that they shall be void, if the buildings "be or become vacant and unoccupied and so remain for ten days."

The meaning of this clearly is that the company insures the property with the agreement and upon the condition that, being vacant at the time, or becoming vacant at any future time while the policy continues in force, such vacancy shall not continue longer than ten days; and if it does so continue longer than ten days, the policy shall then become void. We can not find in this any waiver of the condition with or without knowledge, but rather an express declaration that it is one of the conditions upon which the policy is issued. *Newmarket Savings Bank v. Royal Ins. Co.*, 150 Mass. 374.

It is true that such a policy may not necessarily become absolutely void by reason of the premises becoming vacant or unoccupied, and so remaining beyond the stipulated

period. *Germania Fire Ins. Co. v. Klewer*, 129 Ill. 599-607. Nor is the company bound in case it learns of such vacancy, to declare the policy forfeited. It may waive the forfeiture. But such waiver of the right of forfeiture is not a waiver of the condition during the time the breach continues. *Firemen's Ins. Co. v. Horton*, 170 Ill. 258-261; *Coursin v. Penn. Ins. Co.*, 46 Pa. State, 323-330. If the loss occurs while the vacancy continues to exist, the company is not necessarily rendered liable because, knowing the fact, it has not meantime forfeited the policy. But if it does not exercise its right in this respect, and the premises are again occupied, and are not vacant or unoccupied when the loss occurs, the liability on the policy would again attach. *Ins. Co. of North America v. Garland*, 108 Ill. 220-226, and cases there cited. It is held in that case that the consent of the company to the transfer of the policy, with notice of the fact that it is then unoccupied, is not of itself in law a waiver of the condition.

Nor is the retention of the unearned premium with knowledge of the condition violated by reason of the premises being vacant and unoccupied, to be regarded as a waiver of the condition, while the breach continues. The breach of condition may cease at any time, and the premises cease to be unoccupied, especially where, as in this case, the houses are for rent; and it is not conduct of which the assured ought to complain that the insurance company has not chosen to exercise its right to forfeit the policy because of the temporary breach of condition.

It is conceded by appellee that had the condition been merely that the policy should become void if the building insured be or become vacant and unoccupied without the consent of the company indorsed in writing, in such case if the agent should take the premium and issue the policy with full knowledge that such building is vacant and unoccupied, the company would be estopped to assert the condition as a bar to recovery. The consent of the company might in such case be presumed, and the indorsement of it in writing be considered waived. But such is not the condition in the case at bar.

It appearing, then, that the property was vacant and unoccupied at the time of the fire, and had remained so for much more than the specified ten days, we are of opinion that appellee was not liable to the assured upon the policies in question. It follows that the statement to that effect made to appellant by the agent, Smith, was correct, and that no fraud or deception was thereby practiced upon appellant.

Appellant was not, therefore, fraudulently induced to surrender and cancel her said policies by such representations, and we do not deem it necessary to discuss what would have been the effect of her release and waiver of interest in the policies had she then possessed any valid claim thereunder. She received the return premium, and surrendered and delivered the policies to the appellee as her own voluntary act with correct information as to her rights.

The action in this case was not brought within twelve months after the fire, although the policies in controversy provide that no such action shall be sustainable unless commenced within that time. This clause is a valid and binding agreement between the parties. *Phoenix Ins. Co., of Brooklyn, v. Lebcher*, 20 Ill. App. 450; *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92.

It does not appear that appellant ever waived the limitation or estopped itself from asserting such defense. The action is undoubtedly based upon the policies. The fact that the policies were not in the possession of appellant did not preclude her suing upon them within the time limited. Appellant was only liable, if at all, under the policies. If appellee had any claim it was upon the policies. The conditions were equally binding upon both parties to the contract. There is no evidence that the assured was ignorant of the condition. But in view of the conclusion as above stated, that appellee was not liable under the policies, it is unnecessary to extend the discussion upon this point.

For the reasons indicated, the judgment of the Circuit Court must be affirmed.

**La Salle Restaurant and Oyster House v. Thomas J. McMasters.**

1. **RESTAURANT KEEPERS—As Bailees.**—In this case the court holds a restaurant keeper liable as a bailee for the loss of an overcoat of his guest.

**Assumpsit**, for the loss of an overcoat. Trial in the Superior Court of Cook County, on appeal from a justice of the peace; the Hon. PHILIP STEIN, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed December 5, 1899.

**Statement.**—This suit was commenced by appellee before a justice of the peace to recover from appellant the value of an overcoat and some articles lost therewith. Appellant was a restaurant keeper in the city of Chicago. January 26, 1898, appellee entered the restaurant of appellant as a patron. After entering he said to the waiter, who afterward took his order for refreshments, that he, appellee, did not see a vacant rack upon which to hang his coat. Thereupon the waiter took the coat and said that he would take care of it. He hung it upon a rack near to and a little back of appellee. When appellee had finished eating, and was about to depart from the restaurant, his coat could not be found. On the bill of fare was conspicuously printed the words: "Not responsible for hats and coats." Appellee recovered judgment in the justice court. Upon appeal to the Superior Court and trial there before a jury, there was a verdict and judgment in favor of appellee. From that judgment this appeal is prosecuted.

NEWMAN, NORTHRUP & LEVINSON, attorneys for appellant.

Appellant is not an inn-keeper, and, therefore, not subject to the severe and peculiar liability which the common law imposes upon inn-keepers. 11 Am. & Eng. Ency. of L. 7; Story on Bailments (8th Ed.), Sec. 475; Schouler on Bailments, 252; Lewis v. Hitchcock, 10 Fed. Rep. 6; Carpenter v. Taylor, 1 Hilton (N. Y.), 193; Cromwell v. Stephens, 2

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Daly, 15; *The Queen v. Rymer*, L. R., 2 Q. B. D. 136; *Doe v. Laming*, 4 Camp. 73; *Sheffer v. Willoughby*, 61 Ill. App. 264; *Pullman Palace Car Co. v. Smith*, 73 Ill. 360.

He is not liable as bailee of the overcoat. *Rea v. Simmons*, 141 Mass. 561; *Farber v. Railway Co.*, 32 Mo. App. 378.

JEROME PROBST, attorney for appellee.

Appellant is liable for the loss of the overcoat and its contents, as a bailee for hire. *Appleton v. Welch*, 45 N. Y. Supp. 751; *Buttman v. Dennett*, 30 N. Y. Supp. 247; S. C., 9 Misc. Rep. (N. Y.) 462; *Bunnell v. Stern*, 122 N. Y. 539; *Dilberto v. Harris*, 95 Ga. 571; *Ultzen v. Nicols*, 1 Q. B. (Law Rep. 1894) 92.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

It is urged by appellant and conceded by appellee that appellant is not an inn-keeper, and not subject to the peculiar liability which the law imposes upon inn-keepers.

On behalf of appellant it is contended that the waiter did not accept the coat of appellee as an agent or representative of appellant, but as an agent of appellee. This contention is based, mainly, upon the fact that the words "Not responsible for hats and coats" is upon the bill of fare, and the fact that it was provided by the rules of the restaurant that "waiters must under no circumstances take coats, hats or umbrellas from patrons, politely showing them the hat racks."

As to said quotation from the rules, it is sufficient to say that it was not posted for the public until after the loss of the coat in question, and that there is no evidence that appellee knew of such rule. That rule was posted only in the waiters' dressing room.

The waiter who took the coat from appellee testified that the head waiter had instructed him to take charge of hats and coats for guests. The head waiter testifies that he did not so instruct said waiter. Whether he did or not was a question of fact for the jury. The verdict is conclusive



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upon this court upon that question, under the record in this case.

The contention that appellee was guilty of gross negligence is not sustained by the evidence. The verdict was for \$35. It is contended that this is excessive. It may be true that the jury allowed a full price or a little more for the coat and other property, but there is no such excess as would justify a reversal. The judgment of the Superior Court is affirmed.

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**John A. Lomax v. Mary Ragor et al.**

1. *INJUNCTIONS—Evidence of Damages on Dissolution.*—Upon the dissolution of an injunction, the measure of damages should be what the defendant has paid, or become liable to pay, and the usual and customary fee paid for such services to attorneys for their services, not what the attorneys in the case give it as their opinion would be a reasonable fee.

*Injunction.*—Assessment of damages on dissolution. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed December 5, 1899.

JAMES MAHER, attorney for appellant.

HENRY W. BRANT, attorney for appellees.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This was a bill in chancery for an injunction against the appellees from trespassing upon certain premises.

Upon final hearing, the temporary injunction that had been granted *ex parte*, upon the filing of the bill, was dissolved, and leave was given to appellees to file their suggestion of damages, which was done and upon evidence heard an order was entered assessing appellees' damages at \$500.

It is from such order this appeal is prosecuted.

The only remedy prayed for in the bill was for an injunc-

tion, and the only basis for the allowance of the damages assessed was for solicitor's services rendered in said cause in and about the dissolution of the injunction.

The only witness testifying as to the solicitor's fees was the then and here solicitor for the appellees, and his testimony was that his "services were worth \$1,000;" that he had no contract, but his claim was based upon a *quantum meruit*; that he came first into the case upon the argument upon the testimony before the master; that he had receipts (not introduced in evidence) for \$500 paid by his clients to other attorneys, prior to his connection with the case, for carrying on the litigation, but knew nothing about such payment except what had been told him by his clients and such other attorneys, and the receipts themselves.

There was no evidence that appellees had ever paid the witness anything or had been charged anything by him. All that is competent in his testimony, so far as the question involved is concerned, is that in his opinion his services were worth \$1,000.

As said in the leading case upon the subject, *Jerne v. Osgood*, 57 Ill. 340 "the attorneys in this case only gave it as their opinion that the fee they named would be reasonable. Such proof is not proper and sufficient upon which to base the decree. It should be, what has the defendant paid, or become liable to pay, and is it the usual and customary fee paid for such services."

See also *Rosenthal v. Boas*, 27 Ill. App. 430; *Lambert v. Alcorn*, 144 Ill. 313.

Because solicitor's fees were not competently proved, the order will be reversed and the cause remanded.

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### Timothy A. Kelly and Elizabeth Kelly v. Queen City Loan and Building Association.

1. BUILDING AND LOAN ASSOCIATIONS—*Deduction of Premiums from* Section 46 of chapter 82 of the statutes authorizes the enforcement of payment in case of default for a prescribed period, by proceed-

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ings against the securities, "without deducting the premium paid or the interest thereon."

**Foreclosure of Trust Deed.**—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed December 5, 1899.

BURTON & REICHMANN, attorneys for appellants.

M. E. AMES, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

Appellee filed its bill of complaint to foreclose two trust deeds made by appellants. These were executed to secure loans or advances, the first of which was upon one hundred and ten shares of stock of the appellee, a building and loan association, at a premium of twenty per cent. To secure this loan appellants executed and delivered their bond, dated October 20, 1891, conditioned for the payment of \$11,000 in semi-monthly installments of \$27.50 each, also interest at seven per cent per annum on said \$11,000, in semi-monthly payments. In April, 1892, appellants applied for a second advance or loan upon five additional shares of stock at the same rate of premium, for which they also executed a bond conditioned for payment of \$500 upon like terms with the first. Appellants received, upon execution and delivery of the said bonds and trust deeds securing the same, \$8,800 for the first loan and \$400 for the second.

The master in computing the amount due added to the principal sums thus advanced and interest thereon, the earned premiums upon the amount of each bond for the term—over five years in the first case and proportionately in the second—which had elapsed since the loans were made, thus allowing appellants a credit for the difference between the full premium for eight years and the premium earned; and he also allowed appellants the earned value of appellants' shares for the same time.

It is contended that the decree is erroneous, for the reason that it includes in the sum found due the earned premi-

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ums. It is said that as the whole premium was deducted at the outset, appellants receiving only \$8,800 instead of \$11,000 on the first loan—and the same proportion on the second—and being required to pay interest on the whole \$11,000, there is no authority shown to divide the premium withheld into eight parts, and charge appellants with one of those parts for each year the loan had run.

The statutes in force when the loans in question were made, authorized the premium to be deducted from the loan in one amount. (Rev. Stat., Chap. 32, Sec. 95.) Section 7, Art. 11, of appellants' by-laws also authorized the deduction of the premiums from the loan. Section 86 of chapter 32 of the statutes authorizes the enforcement of payment in case of default for a prescribed period, by proceedings against the securities "without deducting the premium paid or the interest thereon." In accordance with this statute the appellee might have been entitled to retain the whole premium paid, inasmuch as this is not a case of a borrowing stockholder seeking to pay loans before maturity under the provisions of Sec. 87, Chap. 32 of the statutes. *Mutual Building and Loan Association v. Tascott*, 143 Ill. 305-314.

It is stated, by appellee's counsel, that section 7 of the by-laws of the association has been amended since the loans in question were made so as to provide that premiums are to be thereafter paid in monthly installments for eight years, instead of being deducted from the loan in one amount at the outset. The decree has in the present case given appellants the benefit of this provision, to the extent that they are credited with the premium for the unexpired period of eight years in the same proportion. Appellee does not complain of this, and appellants certainly can not object to an allowance considerably in their favor.

It is further contended by appellants' counsel that, excluding the "earned premiums," the decree is for too large an amount. It is said that the stock was forfeited and membership of appellants thereby terminated; and that thereafter only the actual amount advanced, with interest, after crediting all payments and interest thereon, could be recovered.

It is unnecessary to consider this objection further than to say that appellants were given credit for the full value of the stock upon which the loan or advance was made, up to the time of the proceedings by the directors to realize on the securities. They were given all the privileges and benefit of membership, and have no reason to complain of a decree which gives them, to say the least, all the credits to which they are entitled.

The decree of the Circuit Court is affirmed.

### West Chicago St. R. R. v. Wilson P. Shiplett.

85	683
98	609
85	683
110	586

1. **DUE CARE**—*A Question of Fact.*—Whether or not a plaintiff was in the exercise of proper care and caution is a question of fact for the jury.

2. **NEGLIGENCE**—*A Question of Fact for the Jury.*—Whether the driving of a car at a certain rate of speed, when passing a cable train which had stopped to receive passengers, was or was not negligence, under all the circumstances, is a question of fact for the jury.

3. **DEMURRER**—*Motion to Exclude and to Instruct the Jury to Find for the Defendant.*—A motion to exclude and to instruct the jury to find for the defendant, is in the nature of a demurrer to the evidence, and hence admits all that the testimony proves, and all that it tends to prove.

4. **VERDICTS**—*Where the Court May Exclude the Evidence and Direct the Jury to Find for the Defendant.*—It is only where there is no evidence before the jury on a material issue, in favor of the party having to maintain such issue affirmatively, upon which the jury could reasonably find in his favor, that the court may exclude the evidence and direct the jury to find against him.

5. **DAMAGES**—*When Not Excessive.*—Although the court might have been better satisfied if the damages were less, yet if there is no evidence of passion or prejudice on the part of the jury, they will not be disturbed.

**Action in Case, for personal injuries.** Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Mr. Presiding Justice HORTON not concurring. Opinion filed December 19, 1899.

This was an action against appellant and the Chicago City Railway Company, jointly, to recover for alleged injuries said to have been caused by the negligence of the two companies. Upon the trial the suit was discontinued as to the other defendant, and a verdict was returned and judgment rendered against appellant for thirty-five hundred dollars, from which this appeal is prosecuted.

The declaration charges negligence in construction and maintenance of the tracks dangerously near to each other, and that appellant negligently operated and propelled one of its cars so near to a car which appellee was boarding, and without warning, that appellee was caught and squeezed between said cars, thrown down and injured.

The accident is said to have occurred at or near the junction of Lake and State streets, Chicago. The appellee, with two companions, one being his wife, approached from the west a cable train operated by the Chicago City Railway Company, for the purpose of boarding said train. His wife had gotten on the train, but before appellee had done so he was struck by a car moving north on the west track of appellant's line, knocked down, and it is alleged suffered the injuries complained of.

ALEXANDER SULLIVAN, attorney for appellant; EDWARD J. McARDLE, of counsel.

CREWS & CREWS, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

At the close of the plaintiff's testimony appellant presented a motion in writing to exclude all the evidence from the jury on behalf of plaintiff, and to give the following instruction: "The court instructs the jury to find the defendant not guilty." The court denied the motion and refused the instruction, to which ruling appellant duly excepted. It is urged that the trial court erred in those respects.

There was evidence tending to show that appellee had approached the cable train for the purpose of taking passage thereon; that reaching the front platform at the south end

of a trailer car, he turned around to help his wife, who he supposed was directly behind him, on the car; that she had meanwhile gone to the rear platform and was getting on there; that, as appellee stood looking for her, he was almost immediately struck by an approaching horse car of the appellant, which he did not see, and was knocked down and injured. There is testimony to the effect that the horses drawing this car were moving "at a pretty good trot;" that the car did not stop at all, but kept on its way after the accident, and disappeared around the corner, going west on Lake street.

This evidence presented questions which it was proper to submit to the jury. Whether or not appellee was in the exercise of proper care and caution is a question of fact. *C., St. L. & P. Ry. Co. v. Hutchinson*, 120 Ill. 587-596. It was a question of fact whether driving the car at such a rate of speed when passing a cable train which had stopped to receive passengers, was or was not negligence under all the circumstances. *West Chi. St. Ry. Co. v. Annis*, 62 Ill. App. 180. The motion to exclude, and to instruct the jury to find for the defendant, was in the nature of a demurrer to the evidence, and hence admits all that the testimony proves and all that it tends to prove. It is only where there is no evidence before the jury on a material issue, in favor of the party having to maintain such issue affirmatively, upon which the jury could reasonably find in his favor, that the court may exclude the evidence, and direct the jury to find against him. *Frazer v. Howe et al.*, 106 Ill. 563-573. We find no error in the denial of appellant's motion and refusal to direct a verdict in its favor at the close of the plaintiff's case.

It is said the damages are excessive. We do not find, however, any evidence of passion or prejudice on the part of the jury, and after a careful consideration of the testimony as to the nature and extent of appellee's injuries, are unable to say that the verdict is excessive, although we might have been better satisfied if it was less.

It is urged that the court erred in giving appellee's third

instruction. In this we can not concur. We think it states the rule requiring ordinary care for his own safety on the part of appellee with substantial accuracy, and that the same is true of the phraseology referring to the negligence causing the alleged injury as charged in the declaration.

It is said that the court erred in refusing an instruction relating to the question of appellee's contributory negligence. But the rule of law on this subject is fully, and, so far as we perceive, with substantial accuracy stated in another instruction given at the instance of appellant's counsel. No reason is suggested why it was necessary or proper to repeat it in another form, differing in no material respect.

The judgment of the Circuit Court must be affirmed.

MR. PRESIDING JUSTICE HORTON.

I do not concur in the above opinion because the proof does not sustain the cause of action stated in the declaration.



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